THE MANITOBA

LAW JOURNAL

EDITED BY

JOHN S. EWART,

ONE OF HER MAJESTY'S COUNSEL.

VOLUME I.

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against; nor did it intend that any married woman so having such separate estate of such a particular quality might be sued or proceeded against, but only that such separate estate of such a particular quality might be proceeded against; *and that when the Legislature there used the words, 'as if she were unmarried,' it did not intend to use those words, and that the section should be read as if they were struck out.*"

It is apparent, however, that an Act which provides that a married woman may enjoy her property, as if she were sole and unmarried, cannot relieve her of all the troubles (if any) pertaining to her married condition. If she be allied to a brute, the statute cannot make her joyful—in short does not divorce her. If, then, the family mansion belong to the wife, can she insist upon enjoying it as if she were sole and unmarried, and can she, for that purpose, invoke the assistance of the law to keep her husband off the premises? If she were unmarried she could enjoy her property as she pleased, and have such company as she chose to select. Does the statute, in effect, permit a married woman to do the same thing? If the language is to be taken absolutely, it does.

The point arose in the case of *Symonds* v. *Hallett*, reported in the issue of the English *Law Times* of the 1st December. A motion was made for an injunction, restraining the husband of the plaintiff from entering upon, or taking or continuing in, possession of the house in which the plaintiff resided, and which had been settled to her separate use. Mr. Justice Chitty granted the injunction. He said: "It appears to me I shall be acting in accordance with several decisions, which are founded on this, that the Court protects the married woman in the enjoyment of her separate estate, not only against the husband's creditors, but against the husband himself. It was said the effect would be that the order would operate as a divorce *a mensa et thoro*; and that in no case had the Court carried a trust for separate use to that extent. . . . . The husband will be entitled, at once, to take proceedings, if he is

advised so to do, in the proper division of the High Court, against the wife for restitution of conjugal rights, and he can, out of his own property (for I understand from Mr. Ince that he carries on a large business) provide a house for the wife and ask her to reside there." What a husband who is not carrying on a large business, can do, the Judge does not say. The motion was appealed, and the order affirmed, on the unsatisfactory ground "that the husband was proposing to go to the house, not for the purpose of associating with his wife, as a husband, but for the purpose of using the house as a house," and the Judges expressly reserved their opinion upon the abstract question. Cotton, L. J., said, "The question raised here is one of the very utmost importance, and it must not be supposed, by my concurring in what is the view of the other members of the court, that the injunction should not be disturbed; that I look with the slightest favor on the contention of the plaintiff's counsel that there is a right, in the case of a married woman being entitled to a house for her separate use, that she should come to a court of equity to restrain her husband at her will and pleasure from entering there. I shall not decide the question now in any way, because the opinion of the court, in which I concur, is, that under the circumstances of the case, it would not be desirable to discharge this injunction. But, in my opinion, it will have to be seriously considered whether there is, in the creation of a court of equity—which separate estate is—anything which would entitle a wife to exclude her husband from the place where she is residing and from coming there to exercise the rights he has of a husband. Undoubtedly, Courts of Equity have said that, where property is settled to the separate use of a married woman, she is, as regards that property, to be considered as if she were a *feme sole*. That is so: and, as regards protecting the property against the interference by the husband, if he wishes to deal with it as his property, and to deprive his wife of the property in it, then, undoubtedly, courts of equity do interfere, and it is their duty so to do; but where it is not interference with the property, assuming it is the property of the wife,

and the husband has no right to interfere with the property *qua* property, it is a very different thing to say that she, a married woman, can insist on a court of equity preventing her husband entering the house. To say that she is *feme sole* is a mere hypothesis and an imagination, because she has a husband, though as regards property she is to be considered as a *feme sole.* Expressions are used that she is entitled to be there in all respects as a *feme sole,* and to be protected against her husband's acts as if he were a stranger. That is very true as regards the property. But is the husband to be considered a stranger because the property is vested in her for her separate use? That is a point which those who assert that the husband is to be considered a stranger must prove very conclusively to me. No doubt it does seem to be the principle of those decisions to which we have been referred; but it is a principle which I do not in any way favor."

While upon this subject it may be well to note a few points connected with the liability of a married woman in respect of contracts and torts.

Contracts.—In Ontario, Cap. 125 of the Revised Statutes, Sec. 20 (of which the Manitoba Statute assented to 25 May, 1881, Cap. 11, Sec. 78, is a copy), enables a married woman to maintain an action, in her own name, for the recovery of any of her separate property; gives her the same remedies, against all persons whomsoever, for the protection, and security, of such property, as if it belonged to her as an unmarried woman; and concludes as follows: "And any married woman may be sued, or proceeded against, separately from her husband, in respect of any of her separate debts, engagements, contracts or torts, as if she were unmarried." Many cases have been decided in Ontario as to the effect of this section upon the wife's power to contract, and; notwithstanding the very general language of the section, it has been repeatedly held that her contracts are to be treated as having been made merely with reference to the separate property, if any, to which she was entitled at the time of making such contracts, and that although she

may (and must) be sued alone upon such contracts, there can be no recovery against her *in personam*, but the judgment must be in the nature of a decree charging the separate property, and awarding execution against it alone. See *Amer* v. *Rogers*, *31 U. C. C. P., at pp. 199, 200; Lawson* v. *Laidlaw*, *3 Ont. A., pp. R. 77.*

Torts.—In *Bishop on the Law of Married Women, vol. 2, sec. 254*, it is said that "It is not true, speaking accurately and scientifically, that the husband is answerable for the torts of his wife. . . . The liability . . . of the husband for the wife's torts grows merely out of the fact, that by the rules of the common law, a suit cannot be maintained against a wife alone during coverture."

In *Capel* v. *Powel*, *17 C. B. N. S., 747*, Erle, C. J., said that Marriage does not give a cause of action against the husband. Whilst the husband lives, and the relation continues, he must be joined in all actions for his wife's debts and trespasses. If the husband dies the action goes on against the wife. If the wife dies the action abates—*because the husband is not liable.*"

In *Amer* v. *Rogers*, *31 U. C. C. P., 195*, it was contended that the Section 20 quoted above was merely permissive, and that in an action of tort the plaintiff was at liberty to join the husband as a defendant, but it was held otherwise, and, as the Statute had removed the impediment to proceeding against the wife alone, that the husband was no longer even a proper party, because he was not liable, and was formerly joined for conformity only.

It must be observed that the position of a married woman as regards liability for her separate contracts, and for her torts, during coverture, is essentially different. She is bound by her civil torts just as if she were dis-covert, and whether she has separate property or not. But her contracts though valid as against her property, cannot be sued upon at law, or in equity, either during or after coverture, so as to bind her person. See *Amer* v. *Rogers*, *31 U. C. C. P., 195*.

As to the right of a married woman to sue in her own name for torts suffered by her, see *James* v. *Barraud, 49 L. T. N. S., 300.*

Quasi Torts.—The distinction just mentioned is important and will, in the future, call for difficult application. In the *Liverpool Adelphi Loan Association* v. *Fairhurst, 9 Ex. 422,* it was held that an action would not lie, against a husband and wife, for a false and fraudulent representation by the wife to the plaintiff, that she was sole and unmarried at the time of her signing a promissory note as surety to him for a third person, whereby the plaintiff was induced to advance a sum of money to that person. Pollock, C. B., said that "A *feme covert* is unquestionably incapable of binding herself by a contract; it is altogether void, and no action will lie against her husband, or herself, for a breach of it. But she is undoubtedly responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any person or for any other personal wrong. But when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it together with the wife."

In *Stone* v. *Knapp, 29 U. C. C. P., 605,* it was held that coverture was a good plea to a declaration alleging that the defendant (the married woman), by falsely, and fraudulently, representing to the plaintiff, that she was authorized by her husband to order certain goods, and to pledge his credit therefor, induced the plaintiff to furnish the goods, whereas in fact she had no such authority. Hagarty, C. J., adopted the following language of Erle, C. J., in *Wright* v. *Leonard, 11 C. B. N. S., 258* (which see): "It seems to me that a false representation, by which credit is obtained, is in its nature more fit to be classed with contracts than with wrongs. It is in substance a warranty of a debt, and so a contract." In this view the plaintiff should have replied separate estate, or, perhaps, recast the declaration, so as to

make it more apparently in contract, and then, to a plea of coverture, replied separate estate.

Conveyance by husband to wife, or wife to husband. Upon these points see *Baddeley* v. *Baddeley, L. R. 9 Ch. D. 113; Fox* v. *Hawks, L. R. 13 Ch. D., 822; Sanders v. Malsburg, 1 Ont. R., 178.*

PROFESSIONAL MORALITY.

IT is one of the most important functions of a Law Journal to insist upon the observance of professional morality and etiquette. With this object, and as a warning to all concerned, we print Sec. cccxlii. of Cap. 9 of the Revised Statutes: "In case an attorney, wilfully, and knowingly, acts "as the professional agent, or partner of any person not, "qualified to act as an attorney, or suffers his name to be "used in any such agency or partnership, on account of any "unqualified person, or sends any process to such person, or "does any other act to enable such person to practise in any "respect as an attorney, knowing him not to be duly quali- "fied, and in case complaint be made thereof in a summary "manner to the benchers, and proof be made thereof upon "oath to the satisfaction of the said benchers, the attorney "so offending may, in the discretion of the benchers, be "struck off the roll, and disabled from practising as such "attorney, and the Court of Queen's Bench may commit "such unqualified person to any common gaol or prison as "for contempt, for any period not exceeding one year."

The existence of this statute seems to be either unknown or it is regarded as repealed. Acting for Ontario attorneys (who are "unqualified persons," so far as we are concerned), upon agency terms, is as much a breach of this statute as allowing a student, residing in one town, to practise under the name of an attorney residing in another.

A similar statute in England is rigidly enforced, as may be seen by reference to the English Law Journal for December 1, 1883, at page 652. The sentences in the cases there reported were not too severe. The attorneys were struck off the rolls, and the "unqualified persons" sent to prison for six months. Lord Coleridge said that "a greater misconduct can hardly be committed by any solicitor than to lend his name to an unqualified person to enable him to act as a solicitor in any action or suit. Anyone can see that that is about as grave an offence as a solicitor can possibly commit.

THE STATUTES.

IT is related that, in Mosaic times, a Hebrew infant was hidden for three months because he was "a goodly child." The Queen's Printer cannot urge the same reason for having kept his latest bantling—Vol. I. of the Statutes of 1883—concealed from the public for nearly half a year. Shame, not pride, may have been the actuating motive. The book is full of blunders. The second page of the volume is entitled "Errata." The third is devoted to the same subject and corrects the second. The fourth—well, the error-compiler must have succumbed, for his work proceeds no further. The edition should be re-called, and the proof-reader discharged.

The Interpretation Act provides that "all copies of Acts, public or private, printed by the Queen's Printer, shall be evidence of such Acts, and of their contents." The Errata are not copies of Acts, and are not, therefore, evidence of anything. The Acts, as printed, are evidence of the originals, and in *Regina v. Poyntz* secured the release of a prisoner, although it was apparent to everyone that when the printed copy of 45 Vic. cap. 36, sec. cv. sub.-sec. 2 provided that an hotel license shall be construed to mean a license for selling liquor in quantities of not *less* than one quart to be

drunk in the house, it should have read *more* than one quart.

There are some peculiarities, however, for which the Queen's Printer may well plead *respondeat superior*. For example, what is meant by cap. 37, which provides that notaries public, appointed by the Lieutenant-Governor in Council, "shall have, use and exercise the power of drawing, passing, keeping and issuing any deeds and contracts, charter-parties and other mercantile instruments in this Province, and also of attesting any commercial instrument that may be brought before him for public protestation (*sic*) and otherwise of acting *as usual in the office of notary*." Has there been a race of notaries doing all these things in this part of the world in early times, whose office still in contemplation of the law continues, or to what else is the reference "as usual in the office of notary."

Again, in cap. 28, it is provided that "covenants for title in any deed of conveyance (*sic*), deed of mortgage (*sic*), or deed of lease (*sic*), whether such deed be made in pursuance of the Act respecting short forms of indentures, or otherwise, shall operate as an estoppel against the covenantor and all persons claiming title under him." What was intended, no doubt, was that where there were covenants for title, either absolute or extending only to the acts of the covenantor, such covenants should operate so as to pass by estoppel, any estate in the land which the covenantor afterwards acquired. All that the statute does say is that a covenant for title shall estop the covenantor. Of course it will. It always did. A covenant for title did not in this respect differ from any other covenant. Before another Act is prepared, reference should be made to the following cases: *General Finance Mortgage and Discount Co. vs. Liberator Permanent Benefit Building Society, L. R., 10 Ch., D. 15; Keate v. Phillips, L. R., 18 Ch. D., 560; and Trust and Loan Company vs. Ruttan, 1 Sup. Ct. R. 564.*

IMPORTANT DECISIONS.

Heaven v. Pender, L. R. 11 Q. B. Div. 503; 49 L. T., N. S. 357.
Court of Appeal.

Negligence—Breach of Duty—Injury to Stranger.

ONE G——, a master painter, contractcd with a ship-owner to paint a ship, then lying in the defendant's dock. The defendant, the dock-owner, contracted with the ship-owner to erect a staging round the ship for the purposes of the painting. Whilst the plaintiff, who was in G's employment, was engaged in painting, the staging gave way, owing to the defective condition of a rope which supported it, in consequence of which the plaintiff fell and was injured. In an action for damages for such injuries: *Held* (reversing the judgment of Field & Cave, JJ.), that the defendant was under an obligation to the plaintiff to use ordinary care and skill in order to supply a safe staging, and therefore the plaintiff was entitled to recover. The reasoning of Brett, M.R., is so unusually good, that a somewhat lengthy extract must be given:—"Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property. The question in this case is whether the defendant owed such a duty to the plaintiff. If a person contracts with another to use ordinary care or skill towards him or his property, the obligation need not be considered in the light of a duty; it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another, although there is no contract between them with regard to such duty. Two drivers meeting have no contract with each other, but under certain circumstances they have a reciprocal duty towards each other. So two ships navigating the sea. So a railway company, which has contracted with one person to

carry another, has no contract with the person carried, but has a duty towards that person. So the owner or occupier of house or land who permits a person or persons to come to his house or land has no contract with such person or persons, but has a duty towards him or them. It should be observed that the existence of a contract between two persons does not prevent the existence of the suggested duty between them also being raised by law, independently of the contract, by the facts with regard to which the contract is made, and to which it applies an exactly similar but a contract duty. We have not in this case to consider the circumstances in which an implied contract may arise, to use ordinary care and skill to avoid danger to the safety of person or property. We have not in this case to consider the question of a fraudulent misrepresentation, express or implied, which is a well-recognised head of law. The questions which we have to solve in this case are—what is the proper definition of the relation between two persons, other than the relation established by contract or fraud, which imposes on the one of them a duty towards the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property?—and whether the present case falls within such definition. When two drivers or two ships are approaching each other, such a relation arises between them, when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them. This relation is established in such circumstances between them, not only if it can be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, as it seems to me, because anyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill under such circumstances there would be such danger. And everyone ought, by the universally recognised rules of right and wrong, to think so much with regard to the safety of others who may be jeopardised by his conduct; and if, being in such circumstances, he does not think, and in consequence

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MARRIED WOMEN.

IN modern legislation relating to the property of married women, the phrase "as if she were a *feme sole*" frequently recurs. Are these words to be construed strictly, as meaning absolutely that which they imply, with all their logical consequences, or are they to be taken as illustrative, merely, of the position which it was intended to describe, and not, in effect, declarative that wherever conjugal rights interfere with the rights of property the latter must prevail.

Mr. Justice Armour, in the now celebrated case of *Clark* v. *Creighton*, *45 U. C. R. 514*, takes the language as he finds it, and throws the responsibility upon the Legislature. In a somewhat racy and sarcastic dissenting judgment, he says: "The avowed object of the Legislature, in passing an Act, as made known to the public by the discussion that takes place upon the Bill in its passage through the Legislative Assembly, and the intention of the Legislature, in passing the same Act, as extracted by judicial process, are often widely different. This process as applied to the ninth section, produced this—that when the Legislature there said that any married woman might be sued or proceeded against, it did not intend that any married woman might be sued or proceeded against, but only that any married woman who had separate estate, and that separate estate only of a particular quality, might be sued or proceeded

"Sec. 4. License Commissioners may, at any time before the first day in each year, pass a resolution, or resolutions, for regulating and determining the matters following, that is to say:—

"(1) For defining the conditions and qualifications requisite to obtain tavern licenses for the retail, within the municipality, of spirituous, fermented, or other manufactured liquors, and also of shop licenses for the sale by retail, within the municipality, of such liquors in shops or places other than taverns, inns, alehouses, beerhouses, or places of public entertainment.

"(2) For limiting the number of tavern and shop licenses respectively, and for defining the respective times and localities within which, and the persons to whom, such limited number may be issued within the year from the first day of May in one year till the thirtieth day of April inclusive of the next year.

"(3) For declaring that in cities a number not exceeding ten persons, and in towns a number not exceeding four persons, qualified to have a tavern license, may be exempted from the necessity of having all the tavern accommodation required by law.

"(4) For regulating the taverns and shops to be licensed.

"(5) For fixing and defining the duties, powers, and privileges of the Inspector of Licenses of their district.

"Sec. 5. In and by any such resolution of a Board of License Commissioners the said Board may impose penalties for the infraction thereof."

Let these points, for the sake of clearness, appear in parallel columns:—

Russell v. *The Queen.*	*The Queen* v. *Hodge.*
Powers of Parliament.	*Powers of Leg. Assembly.*
1. To prohibit altogether the liquor traffic.	1. To define the conditions and qualifications requisite to obtain licenses
2. To partially prohibit and to regulate that which is not prohibited, when the object is to secure "peace, order and good government."	2. To limit the number of licenses. 3. To define the persons to whom licenses shall be issued. 4. To regulate the taverns and shops licensed.

A careful comparison of the gist of the decisions thus stated will do much towards removing the difficulty that surrounds the subject; but in order to get a full apprehension of the points involved it will be necessary to consider the arguments which are given in support of the decisions.

"The sole question" in *Russell* v. *The Queen* (as pointed out in *The Queen* v. *Hodge*) "was whether it was competent to the Dominion Parliament, under its general powers, to make laws for the peace, order and good government of the Dominion, to pass the Canada Temperance Act, 1878, which was intended to be applicable to the several Provinces of the Dominion, or to such parts of the Province as should locally adopt it. It was not doubted that the Dominion Parliament had such authority under sec. 91, unless the subject fell within some one or more of the classes of subjects which by sec. 92 were assigned exclusively to the Legislatures of the Provinces.

"It was, in that case, contended that the subject of the Temperance Act properly belonged to No. 13 of sec. 92, "Property and Civil Rights in the Province," which it was said belonged exclusively to the Provincial Legislature, and it was on what seems to be a misapplication of some of the reasons of this Board in observing on that contention that the applicant's counsel principally replied. These observations should be interpreted according to the subject matter to which they were intended to apply.

"Their Lordships, in that case, after comparing the Temperance Act with laws relating to the sale of poisons, observe that: 'Laws of this nature designed for the promotion of public order, safety or morals, and which subjects those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada.'

"And again:—'What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That

is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law.'

"And their Lordships reasons on that part of the case are thus concluded:—'The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs. In the present case it appears to their Lordships, for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects, 'Property and Civil Rights' within the meaning of subsection 13.'"

From these extracts it will be seen that the only point urged as against the constitutionality of the Canada Temperance Act, 1878, was, that the subject dealt with came under the heading "Property and Civil Rights in the Province." It was held that it did not.

The Queen v. *Hodge* turned upon entirely different parts of the statutes. The Provincial jurisdiction was upheld because the subjects dealt with by the Ontario License Act were included under the headings:—(8) "Municipal Institutions in the Province," (15) "The impositions of punishment," &c., and (16) "generally all matters of merely a local or private nature in the Province;" and because they were not included under the heading "(2) The Regulation of Trade and Commerce."

Their Lordships said:—"The clause in sec. 91, which the Liquor License Act, 1877, was said to infringe, was No. 2, "The Regulation of Trade and Commerce," and it was urged that the decision of this Board in *Russell* v. *Regina* was conclusive—that the whole subject of the liquor traffic was given to the Dominion Parliament, and consequently taken away from the Provincial Legislature. It appears to their Lordships, however, that the decision of this tribunal in that case has not the effect supposed, and that when properly considered, it should be taken rather as an authority in support of the judgment of the Court of Appeal."

And again:—"The subjects in the opinion of their Lordships seem to be all matters of a merely local nature in the Province, and to be similar to, though not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the local parliaments.

"Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations, of a merely local character. for the good government of taverns, &c., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulations of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted.

"The subjects of legislation in the Ontario Act of 1877, secs. 4 and 5, seem to come within the heads Nos. 8, 15, and 16, of sec. 92 of British North America Statute, 1867.

"Their Lordships are, therefore, of opinion that, in relation to secs. 4 and 5 of the Act in question, the Legislature of Ontario acted within the powers conferred on it by the Imperial Act of 1867, and that in this respect there is no conflict with the powers of the Dominion Parliament."

Let these grounds of decision now be stated together. The two Acts were held to be *intra vires* because:—

Canada Temperance Act.	*Ontario License Act.*
1. The subjects are included under "laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislature of the Provinces."	1. The subjects are included under: (*a*) "Municipal Institutions in the Province." (*b*) "The imposition of punishment, &c." (*c*) "Generally all matters of a merely local or private nature in the Province."
2. The subjects are not included under "Property and Civil Rights in the Province."	2. The subjects are not included under "The Regulations of Trade and Commerce."

The next question with which their Lordships will have to deal will no doubt be the constitutionality of the McCarthy Act. Upon a question which has evoked so much contrary opinion among the ablest men in the Dominion, and which has become so much entangled with party politics, it would not be useful for us to offer a confident opinion. We may, however, indicate the arguments which occur to us pro and con. Against the Act will be urged the following :—

1. The Privy Council has decided that the subjects dealt with by the Ontario License Act are of a municipal, local and private nature, and by the B. N. A. Act the Legislatures have exclusive jurisdiction in respect of such matters.

2. The Privy Council has decided that the subjects dealt with do not relate to trade and commerce.

3. The only ground, therefore, upon which the Dominion jurisdiction can be supported is, that the law is one for the "peace, order and good government of Canada." But Parliament has not power to enact all laws for these purposes, but only such as may be in relation to all matters *not coming within the classes of subjects by this Act assigned exclusively* to the Legislatures of the Provinces." It has already been shewn that the subject of this Act is a matter "assigned exclusively to the Legislatures."

4. It cannot be that the same power is vested in both legislative bodies. It has been held to be vested in the local Legislatures. The Dominion Parliament can have no jurisdiction.

5. The *Citizens Ins. Co.* v. *Parsons* is a parallel case. It was there said that the Dominion Parliament might have power to require all insurance companies to take out a license before engaging in business, and yet it was decided that the local Legislature had power to regulate contracts between the companies and individuals. So here the Dominion Parliament has power to prohibit the traffic altogether, but the local Legislature have the power of regulation in the absence of prohibition.

6. A case much in point was suggested in the judgment in the Insurance Co. case at page 117. "Suppose," it was said, "the Dominion Parliament were to incorporate a company, with the power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended, if such company were to carry on business in a Province where a law against holding land in mortmain prevailed (each Province having exclusive power over 'property and civil rights in the Province') that it could hold land in that Province in contravention of the Provincial legislation; and if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the Provinces having passed mortmain Acts, though the corporation would still exist and preserve its status as a corporate body."

From this it may fairly be argued that the Dominion Parliament may, in addition to its power of abolishing the liquor traffic, have power to incorporate a company to deal in liquor, but could not give it any license which would avail as against Provincial regulations.

In favor of the constitutionality of the Act will be urged:

1. According to the canons of construction in *The Citizens Insurance Co.* v. *Parsons* it is not sufficient to find that an Act does fall within some of the classes of subjects assigned to the Legislatures (and this is all that *Hodge* v. *The Queen* determines), but, if that is found, then "the further question must be determined, whether the subject of the Act does not also fall within one of the enumerated subjects in sec. 91, and so does not still belong to the Dominion Parliament (and this question was not decided in *The Queen* v. *Hodge*).

2. It was also said in *The Queen* v. *Hodge* that "the principle which that case (*Russell* v. *The Queen*) and the case of the Citizens Insurance Company illlustrates is, that subjects which in one aspect and for one purpose fall within sec. 92, may, in another aspect and for another purpose, fall within sec. 91."

3. Admitting then that with a view to the raising of a revenue the Provincial Legislatures have a regulating power, the Dominion, for the purpose of securing "peace, order and good government" have also the same power, in which case the Dominion law would supersede that of the Legislative Assembly. It was said in *Queen* v. *Hodge* that the objects aimed at by the Ontario License Act were to preserve "peace and public decency, and repress drunkenness and disorderly and riotous conduct." These are matters in respect of which the local Legislature may legislate, not directly, but only if they arise incidentally, and as ancillary to some ulterior object over which it has jurisdiction. The local Legislature has power to issue licenses, and may in connection with that subject of jurisdiction provide that its licensees may be of a certain class and shall conduct themselves in a certain manner—a peaceable, orderly and proper manner. On the other hand, the Dominion Parliament has jurisdiction to legislate directly as to all matters respecting peace, order and good government, and its laws upon these subjects will supersede local laws.

4. There is no antagonism in the fact that a local statute may be valid in the absence of any Dominion Act upon the subject, and yet be subject to be superseded by such an Act. In *L'Union St. Jaques de Montreal* v. *Helisle*, *L. R. 6 P. C. 31*, the Quebec Statute, 33 Vic., c. 58, which relieved a particular society from extreme financial embarrassment by the imposition of forced commutations of the existing rights of two annuitants, was held to be valid; but at the same time Lord Selborne said:—The hypothesis was suggested in argument of a law having been previously passed by the Dominion Legislature to the effect that any association of this particular kind throughout the Dominion, on certain specified conditions, assumed to be exactly those which appear upon the face of this statute, should thereupon, *ipso facto*, fall under the legal administration in bankruptcy or insolvency. Their Lordships are by no means prepared to say that if any such law as that had been passed by the Dominion Legislature, it would have been beyond their

competency ; nor that, if it had been so passed, it would have been within the competency of the Provincial Legislature afterwards, to take a particular association out of the scope of a general law of that kind, so competently passed by the authority which had power to deal with bankruptcy and insolvency."

We will await the unravelling of the difficulty with much interest. With the expediency of centralization or decentralization, of course, we have nothing to do.

THE JUDICATURE ACT.

ANOMALIES and inconsistencies, hallowed and protected by time, supported by education devoted to the portrayal of their necessity, and fortified by a natural skrinking from the effort requisite to a change, are long-lived, surviving many an exposure and departing at last amid the lamentations of those who expended more effort in finding reasons for their existence than would have been necessary for the advance. What reason could ever have been assigned for the existence, side by side, of a court of equity and a court of law, other than the familiar historical reason that the former gradually acquiring its jurisdiction, no attention was paid to symmetry or consistency. No law-giver, however inventive, could devise such an anomaly. If his imagination did, in a wandering moment, conceive the idea, his reason would at once rebel against the thought. If a court is to be entrusted with the administration of justice it would *a priori* appear irrational to erect another court to enjoin its proceedings when its jurisdiction appeared to be inadequate. The obvious course would be to invest the original court with the requisite power to do ample justice in all cases within its jurisdiction.

In Manitoba the constitution of the Court of Queen's Bench, most unfortunately, became the work of able lawyers —able and therefore educated—educated, and therefore imbued with the system in which they had been trained, and in which for many years they had worked. If some intelligent Indian had been Attorney-General he would have constituted the court and told it to hear both sides and do justice, giving it full power to do so. As it is, we have an anomaly more glaring than ever existed in England or Ontario. The curious spectacle is here presented of the Court of Queen's Bench by its injunction restraining proceedings in the Court of Queen's Bench—the Chief Justice on Monday awarding an injunction, practically, to restrain the Chief Justice from doing injustice on Tuesday. Sometimes, too, where the pleadings are in the common law style, the court finds itself unable to give full effect to the equitable doctrines applicable to the case until the appearance of the pleadings has been altered.

In England and Ontario all these incongruities have been abolished and a strong reaction in favor of common sense as against the conservatism of learning has set in. Why, in Manitoba, should the administration of law be any longer hampered by their existence?

PLEADING AND PRACTICE.

We are inclined to think that the matter rests largely with the judges. There are many amendments of the law embraced in the Judicature Acts of England and Ontario not connected with the fusion of law and equity, and some of these will have to be dealt with, if at all, by the Legislature. But the assimilation of the pleading and practice, and also, we think, the application of equitable principles whenever requisite, are within the jurisdiction of the judges.

Con. Stat. cap. 31, sec. 20, provides that "The judges of the said Court of Queen's Bench, or any two of them, of whom the Chief Justice shall be one, may, from time to time, make all such general orders, or rules, as may seem

expedient for regulating the offices of the officers of the said court, and for prescribing and securing the due performance of their duties, and for settling the forms and the practice and procedure, and adapting them to the circumstances of this Province; and more especially the nature and form of the process and pleadings, the taking, publishing, using and hearing of testimony, the examination of parties to suits or actions, *viva voce* or otherwise, the allowance and amount of costs, and every other matter and thing deemed expedient for better obtaining the ends of justice with despatch and inexpensively, and advancing the remedies of suitors; and may, from time to time, suspend, repeal or revise any such orders or rules; but no such orders or rules shall have the effect of altering the principles or rules of decision of the said court."

There seems here to be given, not merely the power, but an express invitation to remodel the pleadings and practice, as may be "deemed expedient for *better* obtaining the ends of justice with despatch, and inexpensively." So much, therefore, of the Judicature Acts as relates to pleading and practice may be dealt with by the judges, but of course the Legislature may also take the matter in hand.

RULES OF DECISION.

In England and Ontario it was necessary to increase the jurisdiction of each of the courts, and also to provide for the rule of decision in cases where conflict had existed. With this view, after dealing particularly with various classes of subjects, it was enacted that: "Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of law with reference to the same matter, the rules of equity shall prevail." It may not be quite clear, in the absence of legislation, what should be done in Manitoba in case of conflict. While the dual system of pleading prevails, it seems natural and proper to apply common law principles where the record contains common law pleadings, and equitable principles where counsel read from a bill and answer.

But if this irrational guide were to desert us, and the pleadings should be assimilated, which set of principles would prevail? For example, in an action by a *cestui qui trust* against his trustees, in respect of property held upon an express trust, could the defendant plead successfully the Statute of Limitations? Or what would be done in the case of a tenant for life, without impeachment of waste, being guilty of equitable waste? And, more especially, we would require to know how the courts would regard a period named for completion of a real estate purchase, whether it would be taken as of the essence of the contract or not. Perhaps it would be advisable that there should be legislation in respect of these matters, and more especially as the judges are prohibited from making any rules which "shall have the effect of altering the principles or rules of decision of said court."

Combined with these two matters—pleading and practice, and rules of decision—there are found in the Judicature Acts various provisions which are of much value, but which we have said are separable from the main object of the Acts, the fusion of law and equity. Among these may be ennumerated:

JOINDER OF CAUSES OF ACTION.

Multifariousness "has ceased to be an objection by the express enactment of the Judicature Act." A plaintiff may unite in the same suit, as many unconnected causes of action as he may have and may choose to combine. This statement is subject to some qualification, but it is sufficiently accurate for our present purpose. A defendant may, however, in case he alleges that the causes of action cannot be conveniently disposed of in one action, move for an order excluding one or more of the causes of action which the plaintiff may have joined. The death of the demurrer for multifariousness would be a relief to the minds of many a perplexed pleader. The cases are numerous where such demurrers have been allowed and overruled, but among all the combinations there is never any case like the one in hand, for the progression of combinations of causes of action is worse than geometrical. Figures are absolute and their

combinations calculable, but allegations are shaded off on every side by distinctions and qualifications, and are not subject to the rules of the multiplication table.

JOINDER OF PARTIES.

All persons may be joined as plaintiffs in whom the relief claimed is alleged to exist, whether jointly, severally or *in the alternative*; and all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or *in the alternative*. For example, the plaintiffs were the the trustees of a charity, and deeming themselves libelled by words published by the defendant, united in bringing one action for the separate torts. *Booth* v. *Briscoe*, *L. R. 2 Q. B. D. 496*. So also, the plaintiff made a contract with one defendant acting as agent for his co-defendant. An action against the principal upon the contract, and in the alternative, if it should appear that the agent acted without authority, against the agent for falsely representing himself as duly authorized, was sustained. *Honduras Inter-Oceanic Railway Company* v. *Lefevre and Tucker*, *L.R. 2 Ex. D. 301*. In the large number of cases, of which the latter is a good example, the present law is unsatisfactory. The plaintiff brings his action upon the contract against the principal. If he be defeated, on the ground that the agent had no authority, he should, by the judgment of the court, be entitled to succeed against the agent for the false representation. But let him try to recover, and the agent will now bestir himself, and probably prove that he had all the authority which the plaintiff, unassisted, was unable in the former action to shew he possessed.

THIRD PARTY CLAUSES.

A most excellent feature of the Acts is the power given to a defendant who claims to be entitled to contribution or indemnity, or any other remedy or relief, over against a third party, to notify such person of the pendency of the action, and thus bind him by the result. The person notified, may, if he so desire, appear in the action and take an active part in the defence; but, whether he do so or not, he is estopped

by the judgment from disputing any matter determined by it. The lack of some such decision has often worked great injustice. A surety may be sued and may be unaware of the existence of some defence, which, when in his turn he sues the principal, may bar his recovery. In any case the surety ought not to be required, in the first instance, to stand the brunt of the attack. He should be in a position to require the principal to fight at first or not at all.

COSTS.

All the statutes with reference to costs following the verdict, obtaining certificates from the judge, etc., are susperseded. All costs are, as they should be, in the discretion of the judge or court. The rights of trustees, mortgagees, or other persons to costs out of a particular estate or fund to which they would be entitled under the old practice, are, however, expressly reserved.

We would commend these matters to the Government as subjects which should be dealt with at the ensuing sittings of the Legislature. If it be thought that there is not sufficient time for the preparation of an Act which would effect a complete fusion and substitute a new practice, there can be, at all events, no difficulty in giving the public the benefit of the other provisions above referred to.

COMMUNICATIONS.

To the Editor Manitoba Law Journal.

SIR,

In your article on the Statutes, in your first number, you do the late Queen's Printer a very great injustice when you lay to his charge the blunders they contain, or the delay in publication. I desire it to be perfectly understood, that I am in no way responsible either for the delay or the blunders.

Yours, etc.,

RICE M. HOWARD.

WINNIPEG, 6th Feb., 1884. Late Queen's Printer.

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DISTRESS.

PRIVILEGES, although sanctioned by the custom of centuries, must, in this practical, equalizing, democratic age, give reasons for their existence, or finally succumb to attack. While landlords made the land laws, no argument in favor of the right of distress was necessary. *Sic volo, sic jubeo* was then sufficient. Times have changed, and now the name of landlord seems to many to carry with it a certain undefined opprobrium, gathered, it may be, from its frequent association with such adjectives as Irish, absentee, rack-renting, &c. It would be impossible, at such a period, that any privileges accorded peculiarly to landlords, especially if without parallels or analogies to sustain them, should escape criticism.

The law of distress is now a favorite subject of attack, and it will be the object of this paper to separate that which is deemed to be the reasonable and defensible portion of that law, from that which must soon be abrogated.

As the law stands at present, a landlord has the right to seize for payment of his rent, all goods upon the premises demised, whether they belong to the tenant or not. There are, of course, some exceptions to the generality of this statement, but it is sufficiently accurate for our purpose.

This law is attacked, not only on the ground that it gives legal sanction to the indefensible practice of robbing Peter to pay Paul (or rather, permitting Paul himself to commit the robbery, a permission not accorded to any creditor other than a landlord), but on the ground that no better reason can be given why a landlord should be his own bailiff, than that a grocer or a banker should enforce payment of his account by peremptory seizure and sale.

We have no answer to make to the first ground of attack. It is, we believe, unanswerable, and the Legislature should protect the Peters from the Pauline raids. It is just and reasonable that a man's goods should be exigible for payment of his own debts, but not for those of others whose liabilities he never assumed and perhaps never knew of.

Here, however, the force of the attack ends. Let us examine the remaining argument. If a man purchase groceries and agrees with the grocer that, in case of default in payment at a given time, it shall be lawful for the grocer to seize and sell the debtor's goods and chattels for payment of the debt, the grocer would have all the rights which a landlord ought to have. Such an agreement would be perfectly legal, and might perhaps with profit to grocers come into general use. Why should a grocer be obliged to incur the expense and risk of loss entailed by a law suit, and why should the debtor be at liberty to bid the grocer defiance for weeks or months, while he is endeavoring to obtain that which the law says he is entitled to, namely, the sale of the debtors goods for payment of his debts.

Irrespective of a special agreement, the grocer cannot act as his own bailiff, while, unless there is an agreement to the contrary, a landlord can do so. This is all the difference that would exist if the Pauline depredations were stopped, and that this is the full extent of the distinction must be kept in mind if confusion is not to attend the argument.

The difference, then, between the positions, is one solely of agreement, and exists because it has been found to be beneficial. If it were not so, custom would long ago have

made an anti-distress clause a part of every lease, and attached a right of distress to grocers' bills.

Is there, however, any reason for the distinction? The custom may have been forced by the landlords. Can it offer any good *raison d'etre?*

If people were all accurate and honest, so that there could never be any doubt as to the existence or amount of a debt, there could be no good reason for requiring the routine of litigation prior to seizure, but every creditor should have a right to go to the sheriff direct, to acquaint him with the facts and require him to perform his office; for it must be remembered that the whole outcome of a suit is, after all, only a similar direction authorized or sanctioned by the court. Many people, however, are not honest, and very few of them are accurate, and the law requires that, unless the parties otherwise agree, the right to seize and sell goods must be established before it is enforced. To this rule it makes an exception in favor of rent, but at the same time, it requires, as one of the inseparable incidents of rent, that it should be *certain.* If there be any uncertainty, it is not technically rent, and cannot be distrained for. It is then a mere debt and must be litigated in the usual way. The object of a suit is to establish the certainty of the debt. Rent is certain without a suit. Why then should it be sued for? It may be objected that there is here a play upon the word *certain,* and to some extent the objection must be admitted. It is not contended that rent must certainly or necessarily be due and unpaid. It is asserted, however, apart from the technical meaning of the word *certain,* that there are few of the elements of uncertainty which naturally attach to a grocer's account. It may be asked why, if a man make a promissory note, and fail to pay it, there is not as much certainty as if a tenant agree to pay rent and make a like default. A legal mind will at once recognize the dissimilarity of the cases. The law does indeed recognize the fact that *prima facie* there is no defence to a suit upon a promissory note, and will not permit any appearance to be entered until satisfied that there is some *bona fide* defence, although in other cases it makes

no such presumption. But are there not numbers of defences usual in note cases which would be unapplicable in actions for rent? For example, the note may have been given for accommodation, in which case the plaintiff may have given no value for it; there may have been an agreement for renewal; it may have been given in payment for goods never delivered; it may have been given for a particular object and diverted from the purpose of the maker; the books are full of defences to such actions.

There are two defences common to actions for rent and upon notes.

First: the agreement or note may never have been made or signed. If the agreement was never made, the tenant most probably is not in possession of the premises, and in that case no distress can take place, and no question can arise.

Secondly: the rent or note may have been paid. When this is the case it is very seldom that there is any doubt upon the subject, and where, as in the case of rent, the payment would be of recent date, if made at all, the fact that a landlord might distrain although paid in full, would not form a very cogent argument against the existing law.

Let us examine now the arguments: (1) that under the present law landlords may abuse their power—may distrain on the day immediately after the due date; (2) may distrain in case of dispute according to their own view of the contract; and (3) may by having a shorter remedy obtain priority over other creditors.

No doubt landlords may distrain in a hasty and summary way, if the agreement has not provided for a delay; and if it were proposed to give them for the first time a power of distress this argument would seem to be somewhat formidable. But the system having been tried, experience is a complete answer to the objection. Landlords have not abused their power in the past, and will not in the future for the best of reasons, that it is not for their interest to harass

their tenants. The same argument may be advanced against the right of any creditor to issue a writ on the first day after default, and so to harrass his debtor, but we do not find that this is often done, and no one proposes to alter the law in that respect. The only difference between the cases is that the landlord's remedy is more direct, but the delay in the other case is not because the law prescribes days of grace, but that the time is necessary for the investigation of the right.

Then it is said that there may be a matter in difference between the landlord and tenant which ought to be tried. We have already answered this objection and re-state it merely for the purpose of pointing out that the law contains a provision which imposes the exercise of caution on the part of the landlord, and which in almost all cases proves to be a sufficient deterrent in cases of real and *bona fide* disputes. We refer, of course, to the clause of the statute of 2 W. & M., Sess. 1, cap. 5, sec. 5, which provides that "in case any such distress or sale as aforesaid shall be made by virtue and color of this present Act for rent pretended to be in arrear and due, where in truth no rent is in arrear and due to the person or persons distraining, or to him or them in whose name or names, or right, such distress shall be taken as aforesaid, then the owner of such goods or chattels distrained and sold as aforesaid, his executors and administrators, shall and may by action of trespass, or upon the case to be brought against the person or persons so distraining, any or either of them, his executors or administrators, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit."

The last point mentioned, viz., that having a shorter remedy landlords have a priority over other creditors, must be based upon the view that a ratable distribution of assets among all creditors should always be made. This argument, of course, does not affect nineteen out of every twenty distresses, because it only relates to cases in which the tenant is insolvent and is being stripped of his whole estate. But even in such cases, in the absence of an insolvent law, the race is not only

to the swift but also to the vigilant; and if it be said that a landlord should not have a shorter remedy than the holder of a note, it may be answered that the practice is as defensible as that which distinguishes the holder of a promissory note from a creditor with a liquidated account, and the latter from one whose claim lies in damages. The law prescribes more delay for cases in which there is more likely to be dispute and less delay where probably less dispute, and no delay at all where experience has shown that disputes are of extremely rare occasion. There seems to be some reason and common sense in this.

The assertion that bailiffs are often extortionate is probably true. In this they resemble the rest of the world, and in this they should be controlled, and their charges regulated by law. Perhaps certain persons might be licensed to act as landlord's bailiffs, in which case their actions could be more readily supervised, but this we would not recommend.

THE TORRENS SYSTEM.

(*Contributed.*)

THE nineteenth century has witnessed a good many important changes in the laws of the Anglo-Saxon races, but we venture to doubt whether any such change which has been effected, is so important and so beneficial in its consequences as that accomplished in the Australian colonies regarding the transfer of land.

In countries like the British colonies, where the ownership of the land is so widely diffused amongst the inhabitants, it must always be a matter of vast importance to the community to have the laws regulating the ownership and transmission of land simple, easily understood, and effective in protecting owners in the rightful enjoyment of their property.

Any improvement in the laws affecting these rights and interests, have a wide reaching effect. It is not merely those who own land who are benefitted, but also the large class which in various ways of business is concerned in transactions with land owners, and in which the land forms the basis of contract. The simplification of the tenure, and transfer of land, and the securing of indefeasibility of title, mean an important addition to the wealth of a community, and the opening up of a source of capital which may be otherwise rendered practically useless by means of the difficulties in the way of effectually and safely dealing with it.

We do not think, therefore, that any apology is due to our readers for discussing this new method of land transfer which has been introduced in the Australian colonies. Its success there, has been established by upwards of 25 years experience of its working, and it behoves us in Manitoba, to know, as soon as may be, the advantages we may derive from an early adoption of it, and it is for this purpose that we wish to point out the principles upon which it is based.

This method of land transfer is commonly called "The Torrens' System," after Sir Robert R. Torrens, its inventor,

and is based on the principles of the registration of title—as distinguished from the registration of *deeds*. But perhaps the words, "registration of title" do not sufficiently convey the idea we wish to express, and it is therefore necessary to explain more in detail the principles of the system.

In order to make the matter clearer, it will be as well to show the way in which it differs from our present system of registration. Some might hastily assume that the registration system at present in force in Manitoba is a registration of title; but this is a mistake. Our present registry offices are mere depositories for deeds, where, it is true, you may find the various documents recorded which collectively constitute what is called the title. But the registry office is no further help than a tin box in the work of ascertaining the state of the title to a parcel of land. It does not afford any guarantee that the various deeds recorded have been drawn in proper form, or that they really carry out what may have been the intention of the parties. Some skilled person must examine all the recorded instruments, and then make up his mind whether, as a matter of law, those documents do or do not, in fact confer a legal title. But, as man is at the best a fallible creature, mistakes are often made, and titles which are thought to be good, turn out to be bad.

Now the registration of titles under the Australian system of transfer is a vastly different thing. Under that system the registry office ceases to be a mere depository of deeds, and becomes an active living agent in the work of conferring and transmitting title to land. In the register is recorded, not the fact that a deed has been made, but the legal effect of that deed—so that, on every transfer recorded, the register does not merely preserve a record of the transaction, leaving its legal effect to be gathered by inspection, but the public officer determines at once whether it is sufficient for the purpose intended by the parties, and if sufficient he records, not the fact of its being made, but the legal result which it has accomplished.

Now it may be reasonably asked: How is the method worked out? Assuming that land has been granted by the

Crown, and that it is desired to bring it under the system of transfer, the title must first be submitted to examination by a public officer appointed for the purpose, any defects he may point out have to be remedied, an advertisement of the application is then published, and if no objection be made the title is registered, that is to say: the property in question is entered upon the register and the applicant certified to be the owner absolutely, or with qualification, according as to how he may have shown his title to be absolute or subject to qualification. Each title constitutes a separate folium of the register, and upon this folium are recorded all transactions short of an absolute transfer of the estate; *e. g.*, all mortgages, leases, etc. The registered owner is furnished with a certificate of title, which is an exact counterpart of the entry in the register. And on any transaction taking place this certificate of title is required to be produced so that the entries made in the register may also be endorsed on the certificate of title. By this means a glance at the folium containing any given piece of land shows the present state of the title to it. For instance, that A. B. is owner, that his title is subject to a mortgage to C., and a lease to D., &c., &c.

Upon an absolute transfer taking place, the entry in the register and the certificate of title are cancelled, and a new folium opened whereon is recorded the title of the transferee, to whom a new certificate title is issued.

Each absolute transfer, therefore, operates as a new starting point.

Let us, for the sake of further illustrating the difference between the system which at present prevails in Manitoba and the Torrens System, pay an imaginary visit to a registry office in Manitoba, and then to one conducted under the Torrens system. In the former, on asking to search the title to a parcel of land, we shall be shown a book called the abstract index; in this book we shall find perhaps, a list more or less lengthy, of the various deeds recorded upon the lot in question; we shall then have to refer to each one of those instruments, carefully weigh its contents, see that it is duly

executed, and determine for ourselves whether or not the person who claims to be the owner is so or not. But however careful we may be, unforeseen, and altogether unexpected, perils may exist. One of the deeds we have so carefully examined, and which seems so perfectly right and proper, may thereafter prove to be a base forgery; or our vigilance may have failed to notice that an important word or two has been omitted from one of them, either of which facts, or many others which might be suggested, would have the effect of rendering the title worthless. Yet all these risks must be run and all this trouble incurred whenever the state of a title has to be ascertained under our present system.

Now let us go to the Torrens Registry Office and ask the state of a title, and what a different reception do we meet. The register is produced, and on one page is to be found all the information necessary to be known in order to our perfect absolute safety in dealing with the property.

Here you have not to search and examine, and critically weigh, various documents, to determine what may perhaps be a very nice and subtle question of law, but you have the fact, absolute and undeniable, presented to you, and it is the fact you want to get at.

We think we have sufficiently displayed the superior merits of Torrens' system.

The necessity for the early consideration of this important question by the Legislature of this Province we do not think can be reasonably questioned.

One of the great difficulties in the way of its introduction in the older provinces arises from the complication of the titles, and the growth of vested interests which are concerned in the maintenance of the old system.

Here these difficulties are comparatively few; with the lapse of time, however, they must inevitably increase. While we are in the spring tide of youth let us by all means avail ourselves of the advantages which the Torrens system holds out, and the full benefits of which we shall the sooner enjoy.

JUDICIAL WORK.

THE following is an extract from a report made by His Honor Judge Ardagh respecting the County Courts of the Eastern Judicial District, and the business transacted in them during the half year ending the 31st of December last:—

"This Judicial District contained last year seven Judicial Divisions having County Courts, the sittings of which numbered eighteen for the half year; the business of which during that period may be given in the aggregate as to six of the Divisions, and as to Selkirk by itself as follows:—

Selkirk Court, held at Winnipeg monthly:—

Number of suits entered	1,975
The remaining Courts of the District	782
Total number of suits entered in last half-year	2,757

Selkirk Court:—

Total amount of claims entered	$ 94,540
In the remaining Courts	44,671
Total amount claimed by plaintiffs in half year	$ 139,211

Selkirk Court:—

Amount received in suits	$ 21,820
In the remaining Courts	9,050
Total amount received	$ 30,880
Of which paid over to suitors at date of returns	$ 30,188

It may be assumed that of the balance of the whole amount claimed a large portion was settled between the parties out of court.

A considerable number of the suits brought to trial are reheard either in Court or in Chambers, and in very many instances they come before the Court a second and third time under garnishee and judgment summons proceedings.

The number of judgment summons issued during the six months is returned as 440, of which 425 were from the Selkirk Court. Out of the whole number 21 orders for commitment were entered, of 30 days each (630 days in all), and of these 21 commitments only one was put into force, the imprisonment lasting but a few hours. I learn also that no commitment from any other District in the Province was enforced during the same period. The orders of commitment were in every instance made for default of appearance before the Court, of the person summoned, to submit to examination, and on the issue of a second summons. The inference to be drawn from the non-attendance, and the subsequent payment or settlement of the debt, being, that the debtor had been able, but was unwilling to pay, until driven to do so by the fear of imprisonment.

The largest sum received by any clerk (paid by fees) in fees for the half year appears to be $870.90; and the smallest amount $33.16. The largest amount received for bailiff's fees (outside of the Selkirk Court) is $1,031 (divided between two persons), and the smallest $40.

These sums are supposed to include mileage, and it should be remembered that no mileage is allowed on executions returned *nulla bona.*

It is evident from these figures that neither the clerks nor the bailiffs of the Court are in receipt of unnecessarily large incomes. Some of the former, whose fees are small, have in the past been subsidized by the Government, and I think in some particulars the latter would be entitled to some consideration in the direction of an amended and improved tariff. In the case of execution, for instance, I see no reason why a bailiff who is set in motion by a judgment creditor, should not (subject to certain restrictions) be paid at least sufficient to cover disbursements.

As to this and other matters connected with the administration of the law in the County Courts, I may have the honor before closing this report, or, otherwise, before the meeting of the Legislature, to offer some suggestions for your consideration.

In the former part of this communication I mentioned that there were seven Judicial Divisions in this District, and I may now go on to state that at present it comprises 14 counties, or 11 counties and union of counties, divided into 48 municipalities, including cities and incorporated towns.

Of the eleven County Court or Judicial Divisions nine are fully organized and have altogether 47 sittings appointed for the year. When the two remaining Divisions of Lorette and Carillon are organized for Court purposes, the sittings in the District for the year will number 55, or over one for each week in the year.

The number of miles required to be travelled in order to hold these Courts is nearly 1200 for each round trip, and over 5000 in the year. Of this mileage 3800 is by rail, and 1200 by driving. The attendance at the Courts outside of Winnipeg, without taking into account special ones for hearing assessment appeals, revising voters' lists and trials of election petitions, occupies nearly two months out of the six. In the Selkirk Courts the number of cases entered on the list for trial each month has latterly averaged about two hundred. Each open sitting occupies about three days, and every remaining working day, not occupied in attending outside Courts, is taken up with trials and other business in and belonging to Chambers.

I have touched upon this subject of personal work (to which may be added that of a large number of speedy criminal trials) as a prelude to the statement, that even without the large increase in Court sittings over those of last year it would be a physical impossibility, on my part, to keep up with the business of the County Courts in this District, and the work otherwise devolving upon me under certain statutory provisions."

MORE JUDGES.

THERE was an extraordinary scene in Court upon the last day of Term. A large number of the Bar appeared, and by their spokesmen expressed to the Bench their sense of the impossibility of procuring justice for their clients. Justice delayed, is, in very many cases, justice refused; and it was of the tardiness that the barristers complained. They bore generous tribute to the ability and assiduity of the judges, and extended to them their appreciation of the indefatigable efforts unremittingly put forth to overtake the work. But why complain to the Bench?—the Bench is powerless to appoint, and can only labor on. A common acknowledgement of the hopelessness of the situation, and a common loyalty to the administration of justice, brought judges and barristers together, to formally and publicly protest against the continuance of the present condition of affairs. It may be difficult for members of the Government at Ottawa to understand Manitoba and its requirements, although the constantly increasing revenue derived from the Province ought to be of much assistance in the necessarily constant expansion of their ideas of corresponding necessities. At the commencement of the agitation for additional judges it was said that the amount of business was abnormal, attendant upon the real estate excitement, and would soon shrink to its proper volume. Two years have elapsed since "the boom" left us, but the increase of ordinary litigation has more than supplied the abatement in real estate actions. In England the Courts sit at eleven and rise at half past four, and a week of work is followed by two wherein judgements may be prepared and studies prosecuted. Judges should not be subjected to the narrowing influence of total engrossment in legal work. They should have leisure, not only for the complete mastery of all cases they may have to decide, but also for the pursuit of such literary or scientific subjects

as may relieve the monotony of their work and keep their minds enlarged and vigorous. In Ontario this is to some small extent held in view, but in Manitoba the judges may live, work and die, unknown and unseen beyond the court house walls, leaving nothing for posterity but a number of hastily written judgments and arrears of work that should render a successor impossible—there could be no accumulation of salary! We must not be misunderstood when we speak of hastily written judgments. The Bar has often been surprised at the exhaustive and able judgments which are from time to time delivered, but we imagine that no one would more readily assent to the language than those who have to work in haste that they may sleep at all.

We hope that our judges may not be much longer left without assistance. The arrangement said to have been made with the Dominion Government appears for some reason to have fallen through.

REVIEWS.

"Instructions and Suggestions to the Clerks and Bailiffs of the County Courts of the Eastern Judicial District, Manitoba," is the title of a sixteen-page pamphlet prepared by His Honor Judge Ardagh. It is primarily intended, no doubt, for those to whom it is addressed, but there will be found in it instruction and suggestion for all those who are accustomed to practice in the County Courts. Several forms for use in cases of substitutional service, suits against railways, &c., are given in the appendix.

The Acts respecting the registration of deeds, railway maps and books of reference, by-laws, land tax sales, judgments, partnerships, mechanics' liens, naturalization papers and debentures have all been gathered together under one cover. The amendments to the Registry Act are printed in smaller type, and the Amending Acts are noted in the margin. The Registration Divisions, with the names and addresses of the Registrars, and the statute of last session prescribing the new boundaries, are to be found in the same pamphlet.

THE

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MISREPRESENTATION—DEFINITENESS—ENQUIRY.

"OUR law adopts the rule of the civil law, '*Simplex commendatio non obligat*;' if the seller merely made use of these expressions, which are usual to sellers who praise at random the goods which they are desirous to sell, the buyer could not procure the sale to be dissolved. A purchaser ought not to rely upon them, for it is settled that when they are false and uttered with a view to deceive, they furnish no ground for action." *Sugden on Vendors and Purchasers, p. 3.*

If a purchaser do not rely upon the statements made to him, he cannot complain of their falsity.

There is no doubt about the correctness of these rules; the difficulty, and difference of opinion, arise in their application. For example: Upon the sale of property under lease is a statement that the lease is held by "a most desirable tenant," *simplex commendatio*, or is it a statement of a definite fact, which, if untrue, will form a ground for the rescission of a contract, based upon the assumption of its truth? The words are not equivalent to "*the* most desirable tenant," but rather to "*a very* desirable tenant," which is a degree stronger than "a desirable tenant." Neither of these, however, necessarily describes such a tenant as, in every respect, a landlord's heart could covet. A tenant may be short of

perfection and yet answer the description just as a house may be a very desirable house and yet in some respects be objectionable. What qualities then must a tenant possess before a vendor can rest attaching "very desirable" to his description. Honesty is a good quality—a carouser might spoil the paper and plaster. Freedom from family is another excellent feature. If the premises are used as an hotel, one who would attract guests would no doubt be attractive to landlords for the value of the property would increase with its popularity. If in addition to this winning characteristic, he practised close economy with a view to regular payment of rent he would seem to be "a very desirable tenant," and only second to one who out of his wealth would carry on the house for his own diversion with liberal prodigality and pay the rent in advance—a species rarely encountered. Is, then, the term "a very desirable tenant" a definite expression of a definite idea, or must we not, if we use the term at once express our understanding of its import in order to avoid confusion?

The point arose in *Smith v. Land and Hour Property Corporation*, 43 L. T. N. S. 502, where the facts were as follows:

"The plaintiff advertised for sale by auction an hotel, stating in particulars to be held by a "most desirable tenant." The defendants sent their secretary down to inspect the property and report thereon. The secretary reported very unfavourably, stating that the tenant could scarcely pay the rent 450*l*., rates, and taxes. The defendants, however, relying on the statements in the particulars, authorized the secretary to attend the sale and bid up to 5000*l*. The property was bought in at the sale, and the secretary purchased it by private contract for 4700*l*. It appeared subsequently that the quarter's rent prior to the sale had not been paid; the previous quarter had been paid by instalments, and six weeks after the sale the tenant filed his petition. It appeared, however, that the hotel business was as good during the last year as previously, and that the month of the tenant's failure was the best he had had. The plaintiffs

brought action for specific performance, relying (in answer to the defence and counter-claim for rescission on the ground of misrepresentation) on the fact that the defendants had made their own inquiries. Held, that the statement that the property was held by a "most desirable tenant" could not be treated as "*simplex commendatio*," and that the defendants, having relied thereon, were entitled to rescission of the contract, on the authority of *Redgrave* v. *Hurd*, *L. R. 20 Ch. Div. 1.*

The report made by the secretary was as follows:—

"I visited Walton-on-the- Naze with a view of inspecting the Marine Family Hotel. The hotel has been built over forty years, and up to a recent period enjoyed a high reputation as a respectable and thriving family hotel. Mr. Fleck, the landlord, from the amount of business he is now doing, can scarcely pay the amount of rent with rates and taxes. It seems to be a mystery in the town itself how Mr. Fleck, with his eyes wide open, could have been induced to to take the hotel at present rental. The only thing that I can see that can be done with the hotel to make it pay as an investment would be to make the small theatre into a kind of music-hall, and to convert the billiard-room into a sort of casino. The town itself seems to be in the very last stage of decay from beginning to end; the whole pier wrecked on the 18th Jan., 1881, has never been repaired. The landslip, which occurred on above occasion, has never been made good."

The action came on for trial, when the following evidence was given by the Lord Mayor, who was the chairman of the defendants' board on the 1st Aug., when Mr. McLewin was ordered to attend the sale and bid for the property:

"We had at the time no information as to Fleck's position except the particulars of sale. The secretary was instructed to bid 5000*l.* On the 1st Aug. there was a discussion; the particulars were before us; the "desirable tenant" was the most important part of the whole of the particulars, especially after the secretary's report. That, as far as I can see, was

the unanimous opinion of the board. I should not have bought the property if there had been any hint of any difficulty about the rent: We did not, until six weeks after, discover the condition of the tenant."

On the part of the plaintiffs reliance was placed upon a a conversation which took place between the defendants' secretary, Mr. McLewin, and Mr. Sydney Humbert, a member of the firm of Humbert and Sons, the plaintiffs' auctioneers, who was present when the contract was entered into. The evidence of Mr. Sydney Humbert was, that previously to the signing of the contract he was discussing the price with Mr. McLewin, when he (Mr. Humbert) said that 400*l.* a year ought to be worth 4700*l.*, to which Mr. McLewin replied, "It is not 400*l.* I have calculated it at 300*l.* a year." Mr. Humbert then said, "How is that? because you take it with a good tenant." To which the secretary replied, "I know all about it. I have been staying two or three days at the hotel; no one was staying there at all; two years is the outside I give Mr. Fleck to last."

The expression, "a very desirable tenant," which appears to have been thoughtlessly used by the auctioneer, is thus dealt with by the learned judge:

DENMAN, J.—"A very desirable tenant" seems to me to be a statement of a fact coupled with the fact that he is stated to be a very desirable tenant under a lease which has so many years to run, and which is at so many pounds per annum Putting it together it seems to me to amount to a statement that he is a tenant, and a desirable tenant, or at least desirable in the sense of being a person who is not insolvent, but who is able to pay his way, even although he may be behind in his rent, and not likely to break down so suddenly as this man did, being 3000*l.* to the bad, and unable to obtain credit within six weeks of the time when the contract took place."

Specific performance of the agreement was refused.

If this be law, there seems to be little scope left for auctioneers. They will have to abjure these fervid descriptions by which they are supposed to induce people to purchase, and confine themselves to "going, going, gone." Rigid morality will be vindicated, but must not "a little unpremeditated insincerity be permitted under the stress of social (or business) intercourse"?

Let us examine a few of the cases.

"Great latitude appears to be allowed to sellers in setting forth the advantages and attractions of the property they offer for sale, and when the representations are not in regard to title, but in relation to matters which are objects of sense, and as to which an intending purchaser would, if prudent, examine for himself, the courts are unwilling to relieve the purchaser from his bargain, and have refused relief in cases where the representations made were much further from the actual sober reality than in this case. It is perhaps rarely the case that purchasers are misled by the florid descriptions that are usually to be found in such advertisements; and it is generally the purchasers' own fault if they are misled." Per *Spragge*, V. C., in *Crooks* v. *Davis*, *6 Gr. p. 322.*

On the sale of an advowson, the printed particulars stated that "a voidance of this preferment is likely to occur soon." At the sale the auctioneer stated "that the living would be void on the death of a person aged eighty-two." The incumbent's age was thirty-two, but it appeared in evidence that he expected to be presented to another living on the death of its incumbent, who was aged eighty-two. Sir William Grant thought that the representation made by the printed particulars so vague and indefinite that the court could not take notice of it judicially, and that its only effect ought to have been to put the defendant upon making inquiries respecting the circumstances under which the alleged avoidance was likely to take place previous to his becoming the purchaser. *Trower* v. *Newcome*, *3 Mer. 704.*

This was approved of in *Scott* v. *Hanson*, 1 Sim. 13. In that case a piece of land, imperfectly watered, was described

in the particulars as uncommonly rich water meadow. On decreeing specific performance, Sir J. Leach said:—"I agree with Sir W. Grant, M. R., that a representation which is vague and indefinite is to be treated, by a purchaser, only as a ground for inquiry."

On the negotiation for a lease the lessee asked the lessor what the taxes would be on the property, and the lessor answered that they were about $70 or $75, but that he could not tell exactly, as he had never separated them from his personal assessment. The fact was that for some years the taxes had been nearly double the amount named. The lessee, however, accepted the owner's statement and executed the lease without making reference to the chamberlain's office, where the exact amount could have been ascertained. V. C. Blake said:—"What the defendant did, was to make a speculative statement, on which I do not think the plaintiff was justified in acting. It was such a statement as comes under the language of Sir James Wigram: 'I agree that an indefinite representation by a vendor ought to put a purchaser upon enquiry.' * * * Even if I arrived at the conclusion that the representations were essentially material to the subject in question, I cannot say the plaintiff used proper diligence in the course of the transaction."

Mr. Justice Taylor, in *Huggard* v. *Towner* (unreported), refused to rescind a sale based upon a representation that the property sold was "suitable for a town site," whereas in fact one half of it was annually submerged by the spring floods. He thought, and experience proves, that many places are suitable for town sites although all the year round of marshy character, and that the representation therefore, lacked the quality of definiteness. This learned judge, too, is not one disposed to allow too much scope for the *caveat emptor* plea. In *Hutchinson* v. *Calder*, *1 M. L. R. 18*, he quoted, with approval, the words of V. C. Page Wood:—"The view taken by this court as to the morality of conduct among all parties is one of the highest morality. The standard by which parties are tried here, is a standard, I am thankful to say, far higher than the standard of the world."

We are disposed to think that the words, "a very desirable tenant," occuring in an advertisement would not be taken by any one, at all familiar with the ways of the world, as anything more than the usual puffing commendation, as something calculated, not to mislead, but merely to attract the attention of the public to the sale, as similar to such statements as "splendid investment," "magnificent opportunity," "choicest locality," "better than the best," "extremely desirable property," "just the thing for a gentleman's residence," and many similarly "florid descriptions that are usually to be found in such advertisements."

We are also disposed to think that the decision should, if appealed, be reversed, on the ground that the Company did not rely upon the representation. It was stated that the Board having before it the report of the secretary determined, notwithstanding its statements, to rely upon the advertisement and to purchase the property upon the faith of it. The fact of sending the secretary to the property is amply sufficient to show that the Board placed no dependence whatever upon the advertisement; and after they had the report, they cannot possibly pretend that they paid no attention to it, but believed an advertisement which it contradicted. It is hard to understand how the directors could have the courage to swear that they were such simpletons, and had they, in case of loss, made the explanation to their shareholders instead of to a judge, they would probably have had an opportunity of listening to some valuable dissertations on the methods usually pursued by business men.

With great deference, therefore, we think, (1), that the statement was not of that definite character which is necessary to the rescission of a contract; (2), that, even if definite, the unsupported testimony of the defendants that they relied upon the representation would not be sufficient to induce the court to believe that business men acted as fools; and, (3), that having made enquiries, and having before them the report of their secretary, it is proved affirmatively that they did not rely upon the statement.

ARGUING vs. WRANGLING.

Unskilfulness in boxing, cricket, and other sports shows itself in blind and futile eruptions of nervous energy. The adept is always self-possessed, watchful and effective. In debate the same contrast may be observed. The novice cannot keep still; he must be continually lunging out at his opponent or the judge. If his adversary lays down a proposition of law, it must be instantly denounced; if he contends that the evidence bears a certain complexion, he must be immediately contradicted; if the judge asks a question, it is assumed that only one person is capable of answering it; and after a ruling is given, or a judgment pronounced, it requires several minutes to bring the wrangler to a knowledge of the fact that he is beaten. Let a debate between such men as Edward Blake and Dalton McCarthy be compared with the every day babel and wrangle of our chambers, and our remarks will be amply justified. The object of argument is to convince the judge, not your opponent. It should be borne in mind that the judge does not require constant aid in order that he may retain his common sense, and that for an appeal to his reason argument is more effective than noise.

Interruption is sometimes not only justifiable but imperative. If, in reply, an advocate intentionally, or otherwise, misquote evidence, he should, with an apology for the interruption, be at the moment put right; and, indeed, an interruption at any stage may be justified upon this ground. We have always thought, however, that when the rules of debate permit a reply, it is the very worst policy to point out errors during your opponent's address. Let him proceed, let him build up his argument upon a misconception of the evidence or the law, let him assume premise after premise and cover himself with glory. Your task is being made easy. When your turn comes you have no ingenious argument to meet, you are hampered with no fine distinctions; you point out that there is no foundation for the grand superstructure, and your case is won. Interrupt your

opponent, point out to him that his half-hour has been wasted, and, before he sits down, he will supply in some way the deficiency, or adopt some other argument which it may be impossible to meet.

Let, then, interruption be tempered with discretion, and, above all, with politeness. Barristers, whose manners are in other places unimpeachable, seem to forget that the rules of civility and gentlemanly demeanor are for public as well as private life, and that it is, if possible, a more gross breach of culture to shout down one who is addressing a judge than to break in upon a friend's conversation. Respect must be shown for the judge as well as the one who is addressing him. The one is listening, the other speaking, and your interpolation interrupts both listener and speaker.

This brings us to another point. If the judge sees that interruption is either improper, or ill-regulated, or coarse, the rebuke should come quietly from him. If it be left to the speaker, it will be administered under a sense of annoyance and irritation, and it will not tend to harmony or tranquillity. Let the judges insist upon the observance of the prescribed order of addresses. Let there be the opening, the answer, and the reply, and let us be saved from the wrangle which, in Manitoba, so frequently commences at the opening, and culminating towards the end of the reply merges in it, and continues to rage until the disputants weary of their repetition. The training which our young men are at present undergoing will soon unfit them for argument, and render their opposition offensive.

THE JUDICATURE ACT.

A CORRESPONDENT finds fault with our advocacy of the introduction of the Judicature Act, and asserts that an extremely small minority of the profession are in favor of it. We can hardly believe that the profession in Manitoba are so unprogressive as our correspondent believes. To test the matter, we have determined to ask each member of the bar (not each firm) to send us a post-card answering the following questions:—

1. Do you approve of the unification of the rules of decision?

2. Do you approve of the unification of practice and pleading?

3. Do you approve of the introduction of those portions of the Judicature Act relating to joinder of causes of action, joinder of parties, third parties and costs?

The post-cards may read "yes, yes, yes," or "no, no, no," or as the writer may desire—it will not be necessary to copy the questions.

1. By the unification of the rules of decision is meant the assimilation of the principles followed by the two systems of law and equity. Is it advisable to have two sets of antagonistic principles of law administered by the same court? Is it advisable that the law should be in such condition that if an action is brought at law the plaintiff will succeed, and if in equity he will be defeated? Is it proper that the court should be driven to the device of inserting the words "in equity" in common law papers before justice can be done? (See *Fisher & Brown*, reported in the present number of the MANITOBA LAW REPORTS.) Is it not better to have one set of principles than two, with the uncertainty as to which set the judge will, by exercise of his power of amendment, apply to your case?

2. As to pleading and practice, is there such a divergence between common law and equity cases that they imperatively require different systems by which they may be brought to trial? England and Ontario prove that there is not, but that wherever a man has a cause of action, even a legal mind may be trained to state the grievance in common language, and that there is no greater difficulty in stating plainly the defence. Is it then advisable to maintain the two systems? Have we not enough to learn without doubling any part of our work?

3. We refer our readers to the February number of this journal for a short statement of the matters referred to in the third question.

May we ask members of the bar to send their replies as early as possible.

THE LATE SIR JOHN BYLES.

THE celebrated author of "Byles on Bills," formerly a judge of the Court of Common Pleas, died on the 3rd of February. The *Law Journal* (London) says:—

"The career of Sir John Byles was that of a most successful advocate at the bar, and a very learned lawyer as barrister and judge in one branch of legal study. 'Byles on Bills' for accuracy and clearness is among the best law books in the English language. Lawyers and judges have for years turned to it for information with absolute confidence. It is not too much to say that without it the codification of the law of bills of exchange would have been impossible. Sir John Byles took an interest in this book up to a very few weeks before his death. A question whether its copyright had not been infringed was referred to him to decide whether any and what proceedings should be taken. We believe the matter was amicably arranged, but the incident is curious as showing that one of his last acts was in

vindication of the book which in the future will be his chief title to fame. Sir John was thirty years of age before he was called to the bar, and up to that he had been in business. His business experiences, perhaps, suggested to him the production of a book on one of the most important branches of commercial law. The success of the book still further determined the bent of his legal studies and practice. He became a good commercial lawyer, but he never gained any great reputation in other branches of the law. His mind wanted that breadth and clearsightedness which are essential to the intellectual equipment of a great lawyer, who is to lay down propositions of universal application. He will never take the place filled by James, Willes or Jessel, but will always be known as Byles on Bills, a result to which the 'artful aid' of alliteration conduces. Many are the stories told of Sir John Byles when at the bar and on the bench. His horse figures in several of them. When he was at the bar he had a horse, or rather a pony, which used to arrive at King's Bench Walk every afternoon at three o'clock. Whatever his engagements, Mr. Byles would manage by hook or by crook to take a ride, generally to the Regent's Park and back, on this animal, the sorry appearance of which was the amusement of the Temple. This horse, it is said, was sometimes called 'Bills," to give opportunity for the combination 'there goes Byles on Bills;' but if tradition is to be believed, this was not the name by which its master knew it. He, or he and his clerk between them, called the horse "Business;" and when a too curious client asked where the Serjeant was, the clerk answered with a clear conscience that he was 'out on Business.' When on the bench, Mr. Justice Byles' taste in horseflesh does not seem to have improved. It is related of him that in an argument upon section 17 of the Statute of Frauds he put to the counsel arguing a case, by way of illustration. 'Suppose Mr. So and So' he said, 'that I were to agree to sell you my horse, do you mean to say that I could not recover the price unless, and so on. The illustration was so pointed that there was no way out of it but to say, 'My lord, the section applies only to things of the value of 10*l.*' a retort

which all who had ever seen the horse thoroughly appreciated. Instances of his astuteness in advocacy were numerous. His mode of winning cases was not by carrying juries with him by a storm of eloquence, or cross-examining witnesses out of court, but by discovering the weak point in his adversary's case and tripping him up, or by the nice conduct of such resources as his own case possessed. On one occasion he was retained for the defendant with Mr., afterward Mr. Justice, Willes, whom he led at the bar, but who was afterward his senior in the Court of Common Pleas, in a case of some complication tried before Chief Justice Jervis. At the end of the day (Saturday), Mr. Byles submitted that there was no case, and the judge rose to give his decision next week. In the interval Willes asked Byles why he did not take a particular point which both had agreed in consultation to be fatal to the plaintiff's case. 'I left that to the Chief Justice, 'said Byles; 'I led up to it, and walked round it, so that he cannot miss it, but if I had taken it he would have decided against us at once.' And so it proved, for on Monday morning the Chief Justice gave an elaborate judgment overruling all the points taken, but nonsuiting the plaintiff on a ground which he said he was astonished to find had not been taken by either of the very learned counsel for the defendant, but which in his opinion was conclusive. In another case Byles was for the plaintiff, and Edwin James for the defendant, in an action on a bond tried before Chief Justice Tindal. Byles was a long time in opening his case and examining his witnesses, until the Chief Justice became restless. Still more restless was Edwin James, who wanted to go elsewhere. Byles, seeing his impatience, whispered to him, 'give me judgment for the principal, and I will let you off the interest.' Accordingly a verdict was taken for the plainttff for the amount of the bond without interest. Afterward Edwin James asked Byles why he had foregone the interest? 'You need only have put in the bond,' said he, 'and you would have had both.' 'That was just the difficulty,' said Byles, 'the bond was not in court.' In those days adjournments were not so easily granted as now, and in any ease the costs of the day would have exceeded the

interest. A reputation for successes like these made Byles a formidable adversary.

On one occasion at Norwich he had for an opponent a counsel whose strong point was advocacy rather than law. Byles, who was for the defendant, went into the court before the Judge sat, and in presence of his opponent he called to his clerk, 'What time does the midday train leave for London?' 'Half-past twelve, sir.' 'Then mind you have everything ready; and meet me in good time at my lodgings.' 'But, Serjeant,' said the plaintiff's counsel, 'this is a long case; it will last at least all day.' 'A long case!' said Byles; 'it will not last long; you are going to be non-suited.' The advocate, who stood much in awe of his opponent's legal skill and knowledge, spoke to his client. The result was that the case was settled for a moderate sum, and Mr. Byles caught his train.

Mr. Justice Byles was a strong Tory, and had a horror of Judicature Acts, the fusion of law and equity, and other modern innovations which were floating in the air in 1873. He declared that he would not remain an hour longer on the bench than his fifteen years.

On the first day of Hilary Term, 1858, he took his seat on the bench of the Court of Common Pleas, and on the first day of Hilary, 1873, his resignation arrived. The moment was inconvenient for the appointment of a new judge, but the judge could not resign before, and he would not wait a moment. Of his career on the bench it is enough to say that he was acute, courteous, and upright, as he was kindly in private life. His name is not connected with many great decisions, but he took part in the case of *Chorlton* v. *Lings*, in which it was decided that women did not obtain Parliamentary votes by the representation of the people act, 1867, in virtue of the new franchise conferred on 'every man.' His judgment is an example of his rather quaint and old-fashioned judicial style. 'No doubt,' he says, 'the word man in a scientific treatise on zoology or fossil organic remains would include men, women and children as constituting the highest order of vertebrate animals. It is also

used in an abstract and general sense in philosophical or religious disquisitions. But in almost every other connection the word is used in contradistinction to women. * * * Women for centuries have always been considered legally incapable of voting for members of Parliament, as much so as of being themselves elected to serve as members. In addition to all which, we have the unanimous decision of the Scotch judges. And I trust their unanimous decision and our unanimous decision will forever exorcise and lay this ghost of a doubt, which ought never to have made its appearance.' The following anecdote is also floating around:—A learned counsel on one occasion was pleading a cause before Sir John Byles, and made a quotation from a work, 'which,' said he, 'I hold in my hand, and is commonly called 'Byles on Bills.' Sir John Byles: 'Does the learned author give any authority for that statement?' Counsel, referring to the work: 'No, my lord, Icannot find that he does.' Sir John Byles: 'Ah! then do not trust him; I know him well.'

ADVERTISING.

ETIQUETTE has established the limits within which a lawyer may attract public attention. Largely for lack of a law journal to keep guard in this matter, there have been several instances lately in which it has been only too apparent that the prescribed limits have been exceeded, and that under cover of a newspaper report of some trial, or intended action, the world is notified that Mr. ————'s indispensable services have again been had in requisition. We beg to inform all concerned that we will, in such cases, transfer the advertisements to our columns, and make no charge for the publicity. Some of the envelopes in use, too, savour of the mercantile. The English *Law Journal* for 1st March, 1884, says: "Professional opinion of late has become degradingly callous to what were once the unpardonable sins

of "touting," and "hugging." Let not the far west be too far in advance of the old-fashioned customs.

After this warning, we will not scruple to give the advertiser's name.

Since writing the above, the following advertisement has appeared in the local column of an evening newspaper. It is too transparent to do the writer of it any service.

"BRANDON ASSIZES.

"Mr. ————, barrister, left for Brandon this morning, "being retained to defend one ————, who is to be tried "there before the Chief Justice, for ————————. "He is also engaged as counsel in an important suit against the "C. P. R., also entered for trial there. Mr. ——— ———'s "successful defence in the late ———— case seems to be "bearing fruit."

REVIEWS.

HOLMESTED'S RULES AND ORDERS. (*a*)

THIS is a capital book, and will be of much use to Manitoba practitioners. The first volume, just to hand, contains all the Ontario Chancery Orders unaffected by the Judicature Act, with copious annotations. The book presents very much the same appearance as Mr Justice Taylor's work. The arrangement of the notes is an improvement upon anything that we have seen. By grouping the cases under appropriate headings, and by a plentiful use of black letter and italics, the eye is at once carried to the object of the search. The notes upon the orders relating to parties, proceedings in Master's office, &c., are extremely valuable.

(*a*) The General Rules and Orders of the Courts of Law and Equity of the Province of Ontario, passed prior to the Judicature Act and now remaining in force, with notes, by George Smith Holmested, Registrar of the Chancery Division. Vol. I. The Chancery Orders. Toronto: Rowsell & Hutchinson.

THE

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BULLYING BARRISTERS.

THE evolution of the perfect gentleman from the throat-cutting savage is a tedious process. It may be doubted whether the centuries necessary for the operation do not exceed the lapse requisite for the elevation of the ascidian to the savage. The stages are as wide apart, and the work becoming more intricate, involved and entangled, progresses more slowly. In one sense the molusk retrogrades as the savage kicks the shell. Nothing can be more dignified and gentlemanly than the unruffled equanimity of a jelly-fish; while the savage, especially in his civilized form—the rough—is objectionable and offensive to every living creature, be it man, bird, beast, or (we believe) devil.

If the christian maxim, "Love one another," be apparently unattainable for some more millions of years, civilization has for present use evolved another, which professional men at least should be able to assimilate—"Consider one another." A barrister's life being a record of changes of opinion on almost every point upon which he had deemed his professional education completed, respect and consideration should rapidly take the place of any natural egotism or bullying bumptiousness. And usually this is the case, but in some constitutions the savage or rough is too strongly latent, and with these a little opposition produces the same disorderly results as centuries ago were always associated with antagonism. Conflict and good humor were formerly violent repellants, impossible of united existence; and as the primeval

man may still be seen in the forests, the partially developed gentleman may still be seen at the bar.

Bullying barristers usually confine their offensiveness to witnesses and opposing counsel; some, however, of less perfect development cannot restrain their virulence even when combatting the bench, and their education is the less rapid that with some judges insolence ofttimes is plainly seen to bear down mental opposition. The bully revels in a row; noise and ill-nature are repulsive to a judge of gentlemanly breeding; and thus the bully sometimes has his way that the judge may have his peace. Peace obtained by submission, however, is short-lived. A nation or a judge may only have peace at the expense of such appearance of power as ensures respect. Apparent imbecility provokes imposition. Let a judge be wrong every time but every time let him be decided and strong—his self-possession will give him an opportunity to be right, and he is a dullard indeed if, once feeling free to think, he does not soon learn sufficient law to keep him free from gross mistakes.

In Ontario at present there is at the bar a curious mixture of ability and abuse. A man whose intellect is of the finest order but who would infinitely prefer championing his client in the old wager of battle than in orderly debate. He has some success. One judge in particular—one who was never known to say an unkind word—at the first sneering sentence throws up his helpless hands and wonders how it comes that Mr. ———— can always be right. The judge acts as though he said—

> "Vociferated logic kills me quite,—
> A noisy man is always in the right;
> I twirl my thumbs, fall back into my chair,
> Fix on the wainscot a distressful stare,
> And when I hope his blunders are all out,
> Reply discreetly—'To be sure—no doubt!'"

Juries being more "ready for a row," sometimes find themselves antagonizing a bullying counsel and deciding

against him as a mere matter of opposition. A feeling of sympathy, too, for the person bullied is often at work, and while the bully has his fling his opponent secures the verdict. A marked case of this kind occurred very recently at the present assizes; and, be it well founded or not, (we trust it is not) the jury is supposed to have felt that one adverse verdict was not a sufficient punishment for the offence; or perhaps, to put it more fairly for the jury, they were unable for some time to overcome their resentment and to act without the personal bias which they had acquired. Juries cannot separate entirely the clients from their counsel, and neither can complain if an overbearing insistance upon a verdict secures one for the other side.

As against a weak opponent or with a timid judge, success may sometimes be obtained by bullying,

"Asseveration blustering in your face,"

seems to make

"Contradiction such a hopeless case."

But such success, gained as it is by the infliction of pain upon others, is far from enviable. The great majority of barristers would, as a matter of free choice, prefer a less prominent position with the esteem and friendship of the bar and the public, than a leadership won by inconsiderate and indiscriminate abuse of all opponents.

Emerson, in writing of "men of this surcharge of arterial blood"—as he calls them—allows that "the affirmative class monopolize the homage of mankind," and that "all *plus* is good;" but he carefully adds, "*only put it in the right place.*" Such men, he says, "are made for war, for the sea, for mining, hunting, and clearing; for hair-breadth adventures, huge risks, and the joy of eventful living . . . Their friends and governors must see that some vent for their explosive complexion is provided. The roisters who are destined to infamy at home, if sent to Mexico will 'cover you with glory,' and come back heroes and generals. There are Oregons, Californias, and Exploring Expeditions

enough appertaining to America to find them in files to gnaw and in crocodiles to eat . . . . In history the great moment is when the savage is just ceasing to be a savage, with all his hairy Pelasgic strength directed on his opening sense of beauty, and you have Pericles and Phidias not yet passed over into the Corinthian civility. Everything good in nature and the world is in that moment of transition, when the swarthy juices still flow plentifully from nature, but their astringency or acridity is got out by ethics and humanity . . . We say that success is constitutional; depends on a *plus* condition of mind and body, on power of work, on courage; that it is of main efficacy in carrying on the world, and though rarely found in the right state for an article of commerce, but oftener in the supersaturate or excess which makes it dangerous and destructive,—yet it cannot be spared, and must be had in that form, *and absorbents provided to take off its edge.*" Bullying barristers ought then either to be sent off in search of physical glory, or be required to spend half an hour with a prize fighter before appearing in court.

It is more cowardly to bully a witness than an opposing counsel, as it is less sportsmanlike to shoot barn-yard fowls than grizzly bears. But the fowls must sometimes be killed, and so witnesses must for their disingenuousness frequently be vigorously attacked. But this is the exception—the rule must be based on the right of every witness to be treated civilly, *if he answer fully and fairly the questions put to him.* Counsel may disbelieve a witness—usually a cross-examiner thinks he has good reason for his disbelief—but the witness may, nevertheless, be perfectly honest and truthful, and counsel has no right, upon his own opinion of a statement—the truth of which he, personally, has no means of testing—to tell the witness that he lies. If it were otherwise, in every case each counsel would be justified in assuming his opponent's witnesses to be perjurers, and in treating them accordingly. Counsel is entitled to receive a full and fair answer to his questions, and that is all; evasion he may denounce, and assumed stupidity he may ridicule, but this

is permissible, not because rudeness is right, but for the purpose of eliciting a complete answer to the question put. Frequently the first question asked in cross-examination is of an insulting character, the object being to terrify or infuriate the witness. This is wholly unjustifiable, and should not be tolerated either by the witness or the court. It tends to degrade the dignity of the profession and disgrace the administration of justice. The following, clipped from a Toronto newspaper, is a good sample of what civilians say of their treatment by the bar, and we cannot say that it is any respect too strong :—

"If there is one thing more than another against which the community ought to protest, it is the outrageous insolence with which counsel often badger and seek to confuse and discredit witnesses who are subjected to their cross-examinations. There is not a court, there is not a trial at which notable instances of this unworthy, insulting insolence are not presented. Even respectable men who at other times are passably fair and considerate in their words and actions, seem to think that a witness under cross-examination is fair game, and that no question is too insulting and no proceeding too disreputable if only his evidence can be discredited and his character for veracity incurably destroyed.

"The Stryvers and the Buz-Fuzes are by no means extinct, as this very case in question before the Police Magistrate made abundantly evident, and had Col. Denison not kept a more than usually tight hand upon the gentlemen of the long robe there would have been still stronger proof of that fact. Now why should this be permitted? It is notorious that in many cases the most reliable witnesses are so badgered and brow-beaten that they contradict themselves at every second sentence, and go down wilted and dishonored as if they were themselves not sure but they were the greatest villians and liars alive. The fact is that a very large number of lawyers have got so accustomed to this sort of work that they are perfectly unconscious when they *are* insolent, or what unfairness means, when they have under their hands any witness whose evidence, however truthful it

may be, has to be broken down and discredited, not in the interests of justice, but in those of him who finds their fee and pays them for getting him off. Every one can recall most abominable instances of this kind in which even some who afterwards became ornaments of the bench figured in anything but a creditable fashion.

The plain truth is that these gentlemen seem to think that in this matter they are 'chartered libertines,' and the sooner a good strong word is put in favor of witnesses, and in protection of their feelings and character, so much the better."

ROWS IN COURT.

THE occurrence of rows in court is becoming too frequent and, like continued turbulence in school, the fault may, primarily, be with the parties to the quarrel, but more justly laid to lack of discipline. When such epithets as "jackanapes," "jack-in-the-box," "contemptible cur," "blackguard," are freely thrown across the court room, it is time that the press speak out. Such words are never heard when Mr. Justice Taylor presides, for it is well understood that he would assert and protect the dignity of the court in very summary fashion. There is no use in a judge threatening to adjourn the court when two bellicose barristers are threatening to punch one another's heads, or to bind them over to keep the peace when the reply is "I will break the bond and pay the fine." There is no use in trying to smooth the matter over with the repetition of anecdotes, or in declaring that "Mr. ——— did not mean what he said." Here is a disgraceful scene being enacted in the face of the Court, and it must be stopped and the parties promptly punished—there is no other way to deal with the matter.

Do the judges think that "the boys will get better as they grow older?" and are they trusting to time to quiet the turbulent spirits? Are they prepared to allow themselves to be insulted until human nature changes? If not, they must put aside some of their good nature and come down with heavy and vigorous hand sharply upon all transgressors of propriety, and save our courts from sinking beneath the level of the bar-rooms.

BRIBING A MEMBER OF PARLIAMENT—IS IT A CRIMINAL OFFENCE?

THE following is the judgment of the Toronto Police Magistrate in a case recently before him, so far as it contains an exposition of the law. It is of general interest and importance, and will not appear in the reports.

"The defendants are charged with unlawfully conspiring to corrupt, deprave, impair, alter, and frustrate the constitutional procedure and action of the Legislative Assembly of Ontario and the members thereof in their votes and proceedings therein at the last session by bribing members of the said Legislative Assembly to vote in opposition to the existing administration of the Executive Government of the Province of Ontario and the members of the said Assembly supporting such Government upon questions arising and to arise in such Assembly. Conspiracy is defined to be an agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. The object of the conspiracy charged is said to be to defeat the Mowat Government and the establishment of another in its place. This in itself is not an unlawful object, if accomplished by lawful means, within the spirit of the constitution, but if done by bribery and corruption the effect might be to change the whole course of legislation in this Province from its proper and

legitimate channel. The defendants are charged with conspiring to bribe certain members of the Legislature with money and offices to vote against the Mowat Government, and the question naturally resolves itself under two heads:

(1) Is the bribing or offering of bribes to members of the Legislature to vote in any particular way an unlawful act?

(2) Does the evidence show a conspiracy among the defendants for the purpose of accomplishing the defeat of the Mowat Government by bribing the members of the Legislature?

In *Russell on Crimes, vol. 1, page 318*, bribery is defined to be:

"The receiving or offering any undue reward by or to to any person whatever whose ordinary profession or business relates to the administration of public justice, made to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity, and it seems that this offence will be committed by any person in an official situation who shall corruptly use the power or interest of his place for rewards or premiums."

There is no exact precedent either one way or the other of an indictment at common law for the bribing of a member of the Legislature, and it will be necessary to examine closely the state of the law in order to determine whether the general principles of the common law in relation to this subject make the bribing of a member of the Legislature an offence at common law.

There can be no doubt that the bribery of voters to vote for a member of Parliament has always been an offence at common law. Lord Coke (2 Inst., 200) says:

"It is a maxim in the common law that a statute made in the affirmative, without any negative express or implied, does not take away the common law."

In *Rex* v. *Pitt* (3 Burrows, 1,335,) Lord Mansfield said:

"Bribery at elections for members of Parliament most

undoubtedly has always been a crime at common law, and consequently punishable by indictment or information. This crime still remains a crime at common law."

Here we find the crime of bribery recognized as an offence at common law in matters not connected with the administration of justice except in so far as the members elected to Parliament have the power of passing, amending and repealing laws, and if this is the ground upon which the common law principle rests, it applies with much greater force to the bribery of a member of the Legislature itself. In the *King* v. *Plympton*, (Lord Raymond's Reports II., page 1,377) an assistant burgess of the town of Tiverton was offered a bribe of £500 to vote for a certain person as mayor of the town, the mayor being chosen under the charter by the 12 capital and 12 assistant burgesses. An indictment was laid at common law against the defendant for attempting to bribe an assistant burgess, and Serjeant Bengally, for the defence, urged that:

"Here was no offence charged for it is lawful for one member of a corporation to ask and persuade another to vote for his friend, and if he made such a promise as is alleged in this information it will be no crime without showing the fact done. . . . . But the Court were of opinion that to bribe persons either by giving money or promises to vote at elections of members of corporations *which are created for the sake of public government*, is an offence for which an information will lie."

It will be noticed that the Court makes no reference to the administration of justice, but to the question of *public government*. The next most important case of *Rex* v. *Vaughan* (4 Burrows, p. 2,499), where the defendant offered the Duke of Grafton, a Privy Councillor and Cabinet Minister, a bribe of £5000 to induce him to recommend the defendant for an appointment in Jamaica. Lord Mansfield held that it was a crime to offer a bribe to a Privy Councillor to advise the King. Mr. Justice Yates said:

"No doubt this is an offence at common law."

It was not put upon the ground that it interfered with the administration of justice further than that the office was a semi-judicial office in Jamaica, but there is nothing in the judgment that would not apply to the recommending for any office of any kind. In the case of *Rex* v. *Beale*, cited in *Rex* v. *Gibbs* (East Reports, 185), the bribing of a clerk to the agent for the French prisoners of war to procure the exchange of some of them out of their turn was held to be an offence at common law, although not connected with the administration of justice. These are all the English cases I have been able to discover on the point, and one can therefore only apply to this particular case the general principles of law as laid down in the above cases. While there are no English cases, there has been a parallel case to this in the State of Pennsylvania in 1846 (*Conn* v. *McCook*, quoted in Wharton's Precedents II., 1,012), and there Judge Eldred, who tried the case, was placed under circumstances exactly similar to those in which I am now placed. He had only the common law of England to guide him, and although the case is not an authority in this country, still it is important as showing the views of the judge, who has tried the only case of this kind that I have been able to discover in any country in which the common law of England is recognized. As his views completely coincide with mine upon the law upon this point, I shall quote his words and adopt them as my own.

'It seems from the ancient definition of this offence that the person liable on this charge must be one connected with the administration of justice, or one whose ordinary business relates to the administration of public justice. But the highest judicial tribunals both in England and this country, have decided that the offence extends to persons not immediately connected with the administration of justice. It has been decided in England, before our revolution, that the offence of bribery can be committed by any person in any official situation, who will corruptly use the power or interest of his place for rewards or promises, as in the case of one who was clerk to the agent for French prisoners of war, and indicted for taking bribes in order to procure the

exchange of some of them out of their turn. (*Rex* v. *Beale.*) It has also been held to be a misdemeanour to attempt to bribe a Cabinet Minister and a member of the Privy Council to give the defendant an office in the colonies. (Vaughan's case, 4 Burrows 2499.)

This case, the counsel for the defendant insist, supports their views of the question, inasmuch as the office that was selected was one that related to the administration of justice, but it will be noticed that the definition of the offence on which they rely relates to the person who is liable to conviction and not to the office or thing solicited or desired. Many other cases might be referred to in England on this subject if it were necessary. It is difficult to reconcile these cases with the definition of the offence of bribery as contended for by the defendants' counsel. They rather establish, and clearly so, that in England bribery was an offence at common law, and is extended to persons in official station of great trust and confidence, although their office or business did not relate to the administration of justice in their courts.

If those authorities can be relied on, the ground taken here that an attempt to bribe a member of the Legislature is not an offence, because a member of the Legislature is is not an officer connected with or concerned in the administration of justice in our courts, is quite too narrow and limited. A member of our Legislature certainly has much to do with, and his ordinary business relates as much to, the administration of public justice in the language of one of the definitions given as the clerk to the agent for French prisoners, or as a person who may bribe another at an election for members of Parliament, or as Worrall who was charged with attempting to bribe a commissioner of the revenue of the United States. There are cases where the legislative and judicial powers so commingle that the exercise of a certain kind of judicial authority in the passage of a law is in accordance with the precedents, and not contrary to received constitutional provisions. I have given the subject a careful examination and consideration. It is one of vast

importance to the community and to the individual concerned, who, it appears, has heretofore sustained a good character for honesty, integrity and morality. The offence charged is one highly injurious to public morals, and strikes at the root of our Government. The power to preserve itself is necessary, and I believe concomitant with its existence, and through its law tribunals may punish offences of this nature tending to obstruct and pervert the due administration of its affairs. So far as the peace and quiet and happiness of the people are concerned, it is of as much importance that the law-making power should be as free from the imputation of corruption as the judicial power that administers the laws thus made. The community have as deep an interest in protecting the law-makers from all corrupt and seducing temptations of bribes as they have the judges who expound the laws. I am unwilling, if I had the power, to extend the criminal law one step beyond its known and defined limits, and the argument so earnestly and ingeniously urged by the defendant's counsel, that the offence charged was not indictable or there would have been some precedent, either in England or in this country, found where there was an indictment against a member of Parliament or member of the Legislature, has received due consideration, and although precedents and similar cases are as stars to light our way, in examining questions of this kind we must not, in looking for them, lose sight of general principles or give up the principle because we cannot find a precedent."

These arguments of Judge Eldred seem to be the correct interpretation of the common law in relation to this matter. I will now consider this subject from another point of view. *Roscoe* in *Criminal Evidence*, page 410, says:

"As to conspiracies, of course, it makes no difference whether the final object be unlawful, or the means be unlawful. Here 'unlawful' does not mean 'criminal,' for there are many cases in which a combination to do anything is a crime, although the act itself if done by an individual would not be a crime."

The revised statutes of Ontario, chap 12, sec. 45, gives the Assembly the rights and privileges of a court of record for the purpose of summarily enquiring into and punishing, among other things, "the offering to or the acceptance of a bribe by any member of the said Assembly, to influence his proceedings as such." This clause seems to give the Legislature a certain judicial status.

31 Vic., chap. 71, sec. 3, of the Statutes of Canada provides:

"That any wilful contravention of any Act of the Legislature of any of the Provinces within Canada, which is not made an offence of some other kind, shall be a misdemeanor and punishable accordingly."

Had there been no offence at the common law, these two statutes would make the combination of two or more to bribe members of the Legislature, to influence their proceedings as such, an "unlawful" means of effecting a legal object, and therefore a conspiracy.

Mr. McMaster argued with much force, and the argument was reiterated by Mr. Murphy, that a conspiracy must be for the purpose of doing some act that would be an injury to some innocent third party, and there is no doubt that there is authority for that view. The answer to that argument is, however, that in accordance with our constitution the people govern themselves. Members of Parliament are usually elected to support a certain policy; should they be bribed to take the opposite course in Parliament it would be a betrayal of trust, and a wrong to those who had chosen them to represent their views. If such a thing were allowed a few men with money might change the whole legislation of the country, and the minority might pass laws which would govern against their will the majority of the people of the Province. No one can pretend that this would not be a wrong to innocent third parties, in fact a wrong to the whole community. I think, therefore, that the charge is properly laid, and the only point left is whether the evidence discloses a conspiracy between the defendants as charged.

It will be well to consider first what the law requires as evidence of a conspiracy.

Judge Fitzgerald in *Regina* v. *Parnell* (*14 Cox Criminal Law Cases, page 675*), says:

"There is no necessity that there should be express proof of a conspiracy such as that the parties actually met and laid their heads together, and then and there actually agreed to carry out a common purpose, nor is such proof usually attempted. It is not necessary that the alleged conspirators should have ever seen each other, or corresponded. One may have never heard the name of the other, and yet by the law they may be parties to the same criminal agreement."

In Murphy's case (1837) Justice Coleridge told the jury: "It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is it necessary that they should have originated it. If a conspiracy be already formed, and a person joins in it afterwards, he is equally guilty."

ANOTHER JUDGE.

THE Dominion Government has at last agreed to appoint another judge. Our present judges have had a better title to the sympathy of the Society for the Prevention of Cruelty to Animals than many of the objects upon which it expends its pity. Mr. Justice Dubuc is happily recovering from a severe and painful illness attributable directly to overwork; but no man can indefinitely stand the strain which now for at least two years has been sapping his strength. The profession will be glad to hear of the recovery of so popular a judge, and all the more that in the future he will be able to enjoy some diminution of labor.

ADVERTISING.

WE are assured that the barrister referred to in the newspaper clipping inserted in our last issue was in no way responsible for its original insertion. For this we have the gentleman's word, and while we thought him guilty of an indiscretion, we have always had far too high an opinion of his character and actions to question for a moment his veracity. His abilities and genial bearing will win him his way without the doubtful aid of newspaper puffs, which, while no doubt meant in kindness, in reality tend with the profession and the thinking part of the public, to injure those they are intended to serve.

We are glad to think that our explanations, privately made, have been accepted, and as nothing was "set down in malice," so no undue offence has been taken.

The following, clipped from a Brandon paper, merits reprobation:

A. M. PETERSON,
BARRISTER, SOLICITOR, ETC.,
Of Ontario.
LAW OFFICE, ROSSER AVE., NEXT DOOR
TO LAND OFFICE,
BRANDON, MAN.

Mr. Peterson has not been admitted to practice in this Province, and will perhaps retort that he never said he had. He certainly does say "of Ontario"; but does not many a professional man (more particularly among the doctors) advertise his foreign education; and do the words "of Ontario" convey any other idea than that Mr. Peterson

claims to have had educational advantages not enjoyed by natives. The card appears in the "Legal" column among other professional cards; it tells the locality of a "Law Office," and it is not Ontario work that comes in response to the advertisement.

The Canadian Law Times should appoint an inspector of its advertising columns—some one to separate the loan negotiators, lightning claim collectors, insurance agents, etc., from the barristers and attorneys. Here are two pretty specimens:

D. J. WELCH,

BARRISTER AND ATTORNEY-AT-LAW,
NOTARY PUBLIC,

Special attention given to collection of claims in all parts of the Dominion and negotiation of loans.

Office—Main Street,

MONCTON, - - - - N. B.

PELTON & CLEMENTS,

BARRISTERS, ATTORNEYS-AT-LAW, NOTARIES PUBLIC, MARINE, FIRE, ACCIDENT AND LIFE INSURANCE AGENTS.

Agents for the Nova Scotia Building Society.

YARMOUTH, - - - - N.S.

Edgar N. Clements.
Sandford H. Pelton, Q.C.

Com. for Ontario and New Brunswick.

CORRESPONDENCE.

To the Editor of the Manitoba Law Journal.

DEAR SIR:—I am sure every member of the bar must appreciate your article on "Arguing v. Wrangling," in the last number of the LAW JOURNAL, though all respectable members must and do regret that there is any need for such words to be spoken or written.

One's regret at the present state of things here, is only exceeded by one's surprise, that even *one* member of the bar can be found who has so little regard for the dignity of the profession, that he can bemean himself and it, by such conduct as has recently been displayed in the assizes just closed.

At the same time one could wish that the bench would hold a somewhat firmer hand, and even enforce by a deserved commitment for contempt of court, the transgression of rules of courtesy which are hardly to be borne when transgressed by one barrister to another, but become, when transgressed towards the court, little short of gross insolence of the most unbearable character.

One is almost at a total loss to conceive the reason for the present state of things, when one considers that the large majority of the bar have received their training in Ontario, and have had before them there for years, the ensamples of how things should be done, both decently and in order.

In the time of the late Chief Justice Wood an order was promulgated, that on Tuesday trials no fees should be allowed to counsel unless they appeared in proper court costume; that unless they did so, only attorney's fees should be taxed.

What has become of this order? And what do we find now on the trial of a non-jury case? Neither judge or counsel wearing the slightest mark to distinguish them from their lay brethren, so that a stranger would not even know who was judge and who messenger.

Then on the trial of criminal cases, why should not the guards of the jail, or the constables of the court be clothed in some style that would lend some dignity to the occasion, for let those who deride my sentiments do their best, they cannot get over the fact that to the untutored mind justice comes with far greater force when accompanied with outward signs of dignity and pomp, than when conducted in the shiftless manner now oftentimes witnessed.

The Government of the Eastern Judicial District Board have provided the governor of the jail with a most impressive looking suit decked with gold braid, for what purpose it is hard to say, not to wear, for he never wears it; why should he not be ordered to be in court alongside the prisoner to guard him, gold chain and all. Everyone who was in court at the last assizes when the prisoners from the penitentiary were brought up, charged with attempting to escape, must have noticed the guards who accompanied them, as they were dressed in proper habiliments, and were distinguishable from mere court loafers, which is more than you can say for the constables usually employed.

It seems too bad to have to write in this strain, considering that your journal will be read by not only our eastern brethren, bnt also those across the line, and even across the ocean, but if the learned gentlemen of the long robe, who are supposed to be gentlemen, (heaven save the mark as to some of them,) would only think of the position they occupy, as they ought to do, they would not need such remarks as have been made by a

READER.

THE

MANITOBA LAW JOURNAL.

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BLASPHEMOUS LIBELS.

MATTHEW Arnold insists upon it, that the minority is always right and that the sequel always proves that it is so. This is only a striking and terse way of saying that progress is constantly being achieved by new ideas, at first embraced by the few, finally advancing to universal recognition. In spite, however, of this very patent fact the majority has always considered the rest of the community not only not to be right, but to be most wilfully, obstinately and maliciously wrong. The majority, of course, governs, and when it seems to be apparent to the rulers that the possession or promulgation of certain opinions tends to the subversion of order and happiness and the welfare of the kingdom, then the unlucky proprietors of brains that lead their owners to such conclusions must be silenced and punished. This is not only natural, it is the only logical outcome of the circumstances, and is applied as well where christians are in the minority as where they control legislation. Ecclesiastics argue that it is better to burn one heretic than that he be allowed to contaminate many and put all in danger of eternal damnation. We bow to his logic, but feel that there must be some lapse, some distributive middle, something

NOTE.—We are indebted for much that appears in the following pages to the articles of Mr. Justice Stephen (*Fornightly Review*, March, 1884), and H. J. W. Coulson (*Law Magazine and Review*, February, 1884).

more or less in the case—we refuse his conclusion and plead for liberty of opinion *ut ruat cœlum.*

Being strongly possessed of this feeling we hailed with satisfaction the summing of Lord Chief Justice Coleridge in the celebrated case of *Reg.* v. *Foote*, feeling that although it was a strong step taken by a strong judge, yet that the general sense of the community was in its favor and that it would be accepted as a just, if not sound, exposition of the law. It has not, however, been allowed to pass. Many felt that the constitution had received its death blow and that the destruction of the empire, so often presaged to follow reforms, had at last come to pass. They, of course, let loose their little wail.

Mr. Justice Stephen, from a more dangerous standpoint and with more weighty reasons attacks the charge. He agrees that the law ought to be as the Chief Justice asserts it is—indeed that it should be still more liberal—but that an act of parliament is necessary to make it so.

For a somewhat adequate appreciation of the difficulty it will not be necessary in more than a general way to commence at a period earlier than the restoration. Suffice it to say that for several centuries after the conquest the bishops, both as regards heresy and blasphemy, had it all their own way, and that they made it hot, in this world, at all events, for unbelievers; that in the fifteenth century the bishops received statutory authority to arrest persons suspected of heresy, to try them, to condemn them and to hand them over for execution to the sheriff who burned them alive; that these statutes were replaced by others in the reign of Henry VIII, were revived during the reign of Mary, and abolished by Elizabeth; and that in 1648 the puritans shewed themselves to be as sanguinary as the catholics and declared that "those that say that bodies of men shall not rise again after they are dead are guilty of felony and to suffer death."

After the restoration the courts and modes of procedure by which heresy and blashemy had formerly been punished

were disabled or abolished; but as the offence of blasphemy was a crime at common law the court of King's Bench undertook the administration of the law, and acted in the character of *custos morum*. This, as pointed out by Mr. Justice Stephen, is the origin of the modern law as to blasphemy and blasphemous libels. The law then is to be found in the decisions of the courts and in any statutes passed since the period just referred to. These we propose to shortly notice, but as the arguments for the opposing opinions are derivable from them, let us first, for the sake of clearness, state shortly the gist of these conclusions.

Lord Chief Justice Coleridge holds that the following extract from *Starkie* (*Folkard's Starkie pp. 559, 560*) contains a true exposition of the law: "There are no questions of more intense and awful interest than those which concern the relations between the Creator and the beings of His creation; and though as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions, yet it cannot be doubted that any man has a right not merely to judge for himself upon such subjects, but also, legally speaking, to publish his opinions for the benefit of others. Where learned and acute men enter upon these discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing mischief, must in general tend to the advancement of truth and the establishment of religion on the firmest and most stable foundations. The very absurdity and folly of an ignorant man who professes to teach and enlighten the rest of mankind are usually so gross as to render his errors harmless. But be this as it may, the law interferes not with his blunders so long as they are honest ones, justly considering that society is more than compensated for the partial and limited mischief that may arise from the mistaken endeavor of honest ignorance, by the splendid advantages which result to religion and to truth from the exertions of free and unfettered minds. It is the mischievous abuse of

this state of intellectual liberty which calls for penal censure. The law visits not the honest errors but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations, or wilful sophistry, calculated to mislead the ignorant or unwary, is the criterion and test of guilt. A wilful and mischievous intention, or what is equivalent to such an intention, in law and in morals—a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong." In the same strain the Chief Justice told the jury that: "If the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of a blasphemous libel." In another place he said: "It is no longer true in the sense in which it was true when these *dicta* were uttered that christianity is part of the law of the land. In the time when these *dicta* were uttered Jews, Roman Catholics, Nonconformists of all kinds, were under heavy disabilities for religion, were regarded as hardly having civil rights. Everything almost, short of the punishment of death was enacted against them." Now these disabilities are removed. The late Master of the Rolls might have had to go circuit to try for a blasphemous libel a Jew who denied that Christ was the Messiah, "a thing which he himself did deny, which parliament had allowed him to deny, and which it is just as much part of the law that any one may deny, as it is your right and mine if we believe it to assert." Apart from this the Chief Justice argues that if it is illegal to attack christianity because it is part of the law of the land, that implied that to attack any part of the law would be, if not blasphemous, yet seditious; and this, he says, is an absurdity. For these reasons "to base the prosecution of a bare denial of the truth of christianity *simpliciter* and *per se* on the ground that christianity is part of the law of the land, in the sense in which it was said to be by Lord Hale, and Lord Raymond, and Lord Tenterden is, in my judgment, a mistake. It is to forget that the law grows, and that though the prin-

ciples of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times."

Mr. Justice Stephen, on the other hand, quotes *Blackstone* (*Com. 2nd Ed. IV., 43*) as exhibiting the present condition of the law: "Doubtless the preservation of christianity as a national religion is, abstracted from the intrinsic truth, of the utmost consequence to the civil state, which a single instance will sufficiently demonstrate. The belief in a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the Supreme Being, and a firm persuasion that He superintends and will finally compensate every action in human life (all which are clearly revealed in the doctrines and forcibly inculcated in the precepts of our Saviour Christ), these are the grand foundations of all judicial oaths which call God to witness the truth of those facts which perhaps may be only known to him and the party attesting. All moral evidence, therefore, all confidence in human veracity, must be weakened by irreligion and overborne by infidelity. Wherefore all affronts to christianity, or endeavors to depreciate its efficacy, are deserving of human punishment."

We will now set out the statutes and decisions and leave our readers to judge as between these judges.

The statute of 29 Car. II., c. 2, s. 9, provided that "heresy" should no longer be an offence punishable by the secular law, but should be only subject to ecclesiastical correction "*pro salute animæ*"; and concludes as follows: "Nothing in this Act shall extend or be construed to take away or abridge the jurisdiction of protestant archbishops or bishops, or any other judges of any ecclesiastical courts, in cases of atheism, blasphemy, heresy, or schism, and other damnable doctrines and opinions."

The Act 9 and 10 Wm. III, c. 32, is still in force except as to the doctrine of the Trinity. It is entitled "An Act for the more effectual suppressing of blasphemy and profaneness," and is as follows:—

"Whereas many persons have of late years openly avowed and published many blasphemous and impious opinions, contrary to the doctrines and principles of the christian religion, greatly tending to the dishonor of Almighty God, and may prove destructive to the peace and welfare of the kingdom; wherefore, for the more effectual suppressing of the said detestable crimes, be it enacted, that if any person or persons having been educated in, or at any time having made profession of the christian religion within this realm, shall by writing, printing, teaching or advised speaking, deny any one of the persons of the Holy Trinity to be God, (repealed as to this part by 53 Geo. III., c. 160) or shall assert or maintain that there are more Gods than one, or shall deny the christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of Divine authority, and shall, upon indictment or information in any of His Majesty's Courts at Westminster, or at the assizes, be thereof lawfully convicted by the oath of two or more credible witnesses, such person or persons for the first offence shall be adjudged incapable and disabled in law, to all intents and purposes whatsoever, to have or enjoy any office or offices, employment or employments, ecclesiastical, civil or military, or any part in them, or any profit or advantage appertaining to them or any of them; and if any person or persons so convicted as aforesaid, shall, at the time of his or their conviction, enjoy or possess any office, place or employment, such office, place or employment shall be void and is hereby declared void; and if such person or persons shall be a second time lawfully convicted as aforesaid, of all or any of the aforesaid crime or crimes, that there he or they shall from henceforth be disabled to sue, prosecute, plead, or use any action or information in any court of law or equity, or to be guardian of any child, or executor or administrator of any person or capable of any legacy or deed of gift, or to bear any office, civil or military, or benefit ecclestiastical forever within this realm and shall also suffer imprisonment for the space of three years, without bail or mainprize, from the time of such con-

viction." Sec. 3 provides for discharge of the penalties upon renunciation being made within four months atter conviction.

Reg. v. *Taylor, Ventris 293* (1675).—The words used in this case were, "That Jesus Christ was a bastard and a whoremaster; that religion was a cheat; that he feared neither God, the devil, or man." Lord Hale said: "That such kind of wicked and blasphemous words were not only an offence against God and religion, but a crime against the laws, state and government, and therefore punishable in this court; that to say religion is a cheat, is to dissolve all those obligations whereby civil societies are preserved; and christianity being parcel of the laws of England, therefore to reproach the christian religion is to speak in subversion of the law." Lord Coleridge agrees that these words constitute a blasphemous libel, but contends that the case does not conflict with his position. To this Mr. Justice Stephen answers that the words proved in the case before the Chief Justice were more indecent than those just quoted. But Lord Coleridge would probably reply: "That is a matter for the jury. I told them that it was for them to say whether the words were not 'a permissible attack on the religion of the country.' Decency is a question of fact not of law."

Reg. v. *Woolston, Strange 834; Fitzgibbon 64* (1720). The libel complained of was the publication of a work in which the writer maintained "that the miracles of Christ are not to be taken in a literal sense, but that the whole life and miracles of Christ is an allegory." Lord Raymond held "that whatever struck at the root of christianity tends manifestly to the dissolution of civil government; but I would have it taken notice of that we do not meddle with any differences of opinion, and that we interfere only where the very root of christianity itself is struck at, as it plainly is by this allegorical scheme." Much of the language used in the book seems to have been highly indecent and objectionable. This fact, to Lord Coleridge, justifies the decision, but Mr.

Justice Stephen contends that the decision itself does not turn upon the "decencies of controversy" but upon the fact that "the root of christianity" was assailed.

The cases connected with "Paine's Age of Reason," Wilkes (1764), Williams, (1797), Eaton (1812), and Carlisle (1819), are not dealt with by either of the judges and may be passed over.

Rex v. *Waddington*, *1 B. & C. 26* (1822). The words of the libel were that "Jesus Christ was an imposter, a murderer (in principle), and a fanatic. Lord Tenterden said that he had "no doubt it was a libel to publish the words that our Saviour was an imposter, a murderer (in principle), and a fanatic." Mr. Justice Bayley says: "There cannot be any doubt that a work which does not merely deny the godhead of Jesus Christ, but which states Him to have been an impostor and a murderer (in principle), is at common law a blasphemous libel." Mr. Justice Best gives judgment to the same effect and concludes, "It is not necessary for me to say whether it be libellous to argue from the Scriptures against the divinity of Christ. That is not what the defendant professes to do."

Reg. v. *Gathercole 2 Lewin C. C. 254* (1838). The defendant was a clergyman and was tried for a scandalous attack upon the RomanCatholic religion, and upon the conduct of the Lady Superior and nuns of the nunnery at Scorton, charging them in the grossest terms with immorality and other criminal offences. The jury found the defendant guilty, but Baron Alderson held that though he was rightfully convicted on the charge of libelling the Lady Abbess and nuns, he must be acquitted on the charge of libelling the Roman Catholic religion, for, says the learned judge, "a person may, without being prosecuted for it, attack judaism, mahomedanism, or even any sect of christian religion (save the established religion of the country), the only reason why the latter is in a different situation from the others is because it is the form established by law and is, therefore, part of the constitution of the country."

Reg. v. *Hetherington, 5 Jur. 529* (1841). There were three counts each of which set out a passage of the work prosecuted. The first passage begins, "What wretched stuff this Bible (meaning that part of the Holy Bible called the Old Testament) is to be sure! What a random idiot its author must be!" And goes on to advise that it should be burnt, "that posterity may never know that we believed in such abominable trash;" and more to the same purpose in very violent language. The second count is founded on a passage which says: "The great question between you and me is, Is the Bible the Word of God, or is it not? I assert that it is not the Word of God, and you assert that it is. And I not only assert it is not the Word of God but that it is a book containing more blunders, more ignorance, and more nonsense, than any book to be found in the universe." The third count is founded on a passage in which the author says his object is "to expose this book (meaning the Old Testament) in such a manner that the children of the Stockport Sunday school will reject it with contempt" &c. The case was tried before Lord Denman and he "told the jury that if they thought the libel tended to question or cast disgrace upon the Old Testament it was a libel". In term the verdict was upheld, Littledale, J., said: "The Old Testament independently, of its connection with, and of its prospective reference to, christianity, contains the law of Almighty God; and therefore, I have no doubt that this is a libel in law, as it has been found to be in fact by the jury."

Reg. v. *Noxon* (1841). In this case a jury found the defendant guilty of publishing a profane libel upon proof that he as a bookseller sold a copy of Shelley. "Queen Mab" was thought to contain blasphemy.

Reg. v. *Pooley* (1857). The defendant was convicted for writing, upon a gate on a public road, some foolish and irreverent words about the potato rot, the bible, and his hatred of christianity.

Cowan v. *Milbourne, L. R. 2 Ex. 230* (1867). This was

an action in which the defendant justified a breach of his contract to let rooms to the plaintiff on the ground that they were to be used for the purpose of delivering lectures upon such subjects as "The Character and Teachings of Christ, the former defective, the latter misleading". Lord Coleridge admits that Lord Chief Baron Kelly's judgment "goes the full length of the doctrine" that to attack christianity is to expose yourself to an indictment for libel. From this he dissents and points out that Baron Bramwell rests his judgment upon the Statute of Wm. III.

Whether Lord Coleridge or Mr. Justice Stephen is right will have for the present to remain unsettled. In Manitoba there is the further point, whether the law of England as to blasphemous libels was ever in force here. It is said that to attack christianity is an offence at common law and that the common law was introduced into this Province. But is not this law one which is applicable only to a country where there is an established or state recognized religion? In answer to this we must refer our readers to *Pringle* v. *Town of Napanee 43 U. C. Q. B., 285*, where after an elaborate judgment it was held that although in Ontario no sect was entitled to particular protection the fundamentals of christianity are as safe from denial as in England. The same point has been decided in the same way in the United States. (See the cases referred to in *Pringle* v. *The Town of Napanee, ante.*)

A very large number in the community then, including all the booksellers, are, perhaps, out of jail only upon sufferance of any one who wishes to lay an information. We cannot doubt that it only requires that it should be attempted to apply the law to some persons of respectability in order to ensure its unanimous relegation to the nearly completed list of stupid attempts to stop people thinking, and expressing their thoughts in any language they choose to employ—whether inspid or vigorous.

RECENT LEGISLATION.

WHEN the present Attorney-General assumed office we had hopes that there would be a marked improvement in legislation, so far at all events as the expression of the intention of the House was concerned. Having himself been a judge his experience should be of value in so framing the statutes that at all events patent ambiguity and uncertainty should be excluded. We have been terribly disappointed. We cannot imagine anything more unworthy of a legislative body than the statutes of last session. We give a few examples.

Chapter xv., sec. 1, is as follows:—"Any keeper of a Livery Stable or of a Boarding or Sale Stable, in this Province, may detain in his custody and possession, and before the same shall have been removed out of his custody and possession, but not afterwards, any animal, vehicle, harness, furnishings, or other gear appertaining thereto, and personal effects, of any person who is indebted to him for stabling, boarding or caring for such animal." In construing this law (for we suppose we must so style it) it would be well if some one could be found who would explain how a Livery Stable keeper (even if the stable has a big initial and the owner a small one) can detain in his custody a horse after it has been removed out of his custody. Also, let it in some way be made apparent what the "gear appertaining thereto" includes. Does the "thereto" refer to the horse or the furnishings? and if the latter what are the furnishings to which the gear appertains? Then, may *any* "personal effects" of the debtor be detained? and if so, why are the furnishings and gear specially mentioned?

By sec. 2: "Every livery stable keeper and every keeper of a boarding or sale stable, shall be obliged to keep in his possession, and shall be responsible for any animals and effects detained by him for the full period of such detention, unless they shall sooner be released," &c. This is rather hard on the livery stable keeper, and his buildings are

therefore given less conspicuous letters. There are two duties imposed: first, the keeper must "keep in his possession the animals and effects," "for the full period of such detention unless they shall sooner be released;" and if he knows how to do anything else we will always spell his stable in leaded capitals; and secondly, he "shall be responsible for" any such animals and effects, without exception in favor of acts of God and the Queen's enemies, fire, tempest, or the legislature.

Chapter xvi., s. 3, provides that 46 and 47 Vic., c. 24, is to be amended "by substituting for the word 'two' immediately preceding 'oxen and horses,' the word 'three.'" The only difficulty about this is that the words in the former statute are not "oxen and horses," but "two oxen, two horses." The intention was no doubt to alter both of the twos. What has been done is one of those things no fellow knows.

Chapter xix. provides that there shall be no sale of growing crops until they have been harvested, a feat that probably no one would have attempted even if not restrained by a Manitoba statute; and that even then the growing crops cannot be sold until all exemptions have "been claimed and reserved;" but no provision is made whereby an obstinate debtor may be compelled to put in his claim—no sale can take place until he does.

It is hard to see the advantage of the change from the usual *shall* to the disturbing *should* in chapter xx., s. 1:—"Provided that no company incorporated under said Act *should* commence business until at least ten per cent. of the capital stock of the said company *should* have been subscribed," &c.

Chapter xxviii., s. 1, provides that, "From and after the first day of January, A. D. 1885, the right of mortgagees to distrain for interest due upon mortgages shall be limited to the goods and chattels of the mortgagor only, and as to such goods and chattels, only to such as are not exempt from seizure under execution." Now everyone knows that a mortgagee's right of distress always has been "limited to

the goods and chattels of the mortgagor only." A mortgagee has always heretofore distrained by virtue of a special license accorded to him by the mortgagor, and it was never supposed that the latter could give a license to seize the goods and chattels of any one but himself. There are certainly circumstances under which one who has loaned money upon the security of land may distrain the goods and chattels of third parties upon the premises. A desiring to borrow money from B upon the security of Blackacre conveys it to him, upon the agreement that B is to receive the rents and profits and apply them in reduction of principal and interest. B leases the land to C. It will hardly be contended that the above statute applies to this case; and that B who is a landlord is interfered with in the collection of his rent. Surely the title by which B acquires the land will not affect his relation to C. Then if instead of renting to C, B leases to A, the result is and must be the same. If so, the Act is meaningless, for the clause about exemption from seizure is a matter of contract between the parties, with the freedom of which the legislature does not attempt to interfere.

Sec. 2 of the same Act is a wonderful jumble, but it is too long for extract. It speaks of an order being "made delivering up possession of the premises," and directs the bailiff acting under such an order "to eject and remove the said tenant together with all goods and chattels that he may have on *or about* the premises, and *make the rent in arrear.*

Chapter xxx., requires that hire-receipts, &c., shall "be of no effect whatsoever" as against judgment creditors, purchasers or mortgagees, unless copies are filed within sixty days from the date thereof. This, of course, was a little hard upon the holders of receipt-notes which were then more than sixty days old, so chapter xxxi. amends it and provides that chapter xxx. is not to be held to require the filing of receipt-notes made "before the coming into force of the said Act," (viz.: the first of August, 1884,) "but instead thereof the parties claiming under the same shall within three months of the passing of this Act, (viz.: the twenty-ninth day of July, 1884,)

file . . . . a list or statement and an affidavit," but what that statement and affidavit are to contain we defy anyone to make out. We can only suggest that the whole transaction should be stated with the most minute exactness, and that the affidavit after adopting the same language should quote the statute in full, and make the deponent swear that he has complied with its provisions—to the best of his information and belief.

By sec. 2 the Act is not to come into force until the first of August, and the County Court Clerks cannot therefore act under it until then; but the luckless receipt-note holders have to file their list of transactions up to the first of August, within three months from the passing of the Act, or at latest the twenty-ninth of July.

Space and inclination to prosecute this enumeration of blunders fails us. There are plenty more of the same kind.

The errors just referred to are the result of indifference and indolence, not of incapacity. When a direct purpose has to be served there is no more ambiguity than is necessary to hoodwink the members and get them to make laws without knowing what they are doing—a coating of sugar to get the pill down. The Attorney-General having been retained for the plaintiff in an important mechanics' lien case, and the affidavit not having been sworn in accordance with the statute, it was necessary to the success of the case that the Act should be amended to suit the affidavit; and that the amendment should be made retrospective. A bill therefore was introduced, but the pill was uncoated and the House refused to swallow it, refused to allow pending litigation to be interfered with and inserted a clause making provision to that effect. Nothing daunted, another bill is introduced of a general, vague, uncertain character, providing that *any* affidavit required by *any* statute, &c., should, if sworn, &c., be valid and effectual. To insure success the pill was not inserted until the members had seen and handled the innocent looking object; not until the confusion of committee

had afforded an unobserved moment did the Attorney-General, with his own hand, write in the retroactive words, "have been taken, or." The Attorney-General may plead that the other members should have watched what he was doing. We are inclined to agree with him and to think that when again chairman of a committee he will receive more attention. The members, however, may be excused for not observing the alteration of the bill, for it was so dexterously done that even the clerk of the committee was not aware of the change and reported the bill to the House without amendment. Both bills advanced to and passed their third reading, but it was evidently advisable that one of them should become law and that the other should in some way be strangled. Great genius is never without resource. The Lieutenant-Governor was asked to come down during the session and assent to some bills, the pretext being the boundary bill. *The General Act* (bill number two) *was then assented to and the other was not.* Two scenes more in this precious drama. It was now important that the hearing of the case should be hurried on, for prorogation was approaching and with it the other Act. This was easily accomplished for the defence knew nothing of the plot, and Mr. Justice Taylor when informed by the Attorney-General that he had to leave for Ottawa on the 24th of April fixed the case specially for the 23rd. Prorogation took place on the 29th and the Attorney-General did not leave until the 30th, but, of course, he may have changed his mind about the date. We drop the curtain upon a tableau. The Attorney-General has triumphantly produced his statute and scored his point. Another defect in his proceedings, not thought of and not remedied, has been pointed out, the judge has dismissed the Attorney-General's bill with costs, and the faces of judge, counsel and parties are full of expression.

There seems to be no doubt that another provision was smuggled through the House; we refer to the clause as to confessions of judgment. Whether Mr. Justice Taylor's decision in *Union Bank* vs. *Turner*, is good law or not there is only one opinion about its justice. There can be no doubt

that securing judgment by a judge's order, obtained collusively, is accomplishing that which the statute now amended was intended to render impossible; and we are convinced that the legislature would not have knowingly overruled Mr. Justice Taylor's decision. We trust that there will be a rigorous investigation into the matter, and we would suggest that after the House acquits the Master-in-Chancery, as we have no doubt they will, he be appointed to investigate and report upon the actions of the members.

QUEEN'S COUNSEL.

MESSRS. F. McKenzie, Sedley Blanchard, J. B. McArthur, and A. C. Killam have been appointed Queen's Counsel by the Dominion Government.

Mr. McKenzie has for some time occupied the highest position in the gift of the bar and is an able common law and criminal lawyer.

Mr. Blanchard is one of the ablest business men in the profession, and has been practically at the head of a very large and successful practice for many years.

Mr. McArthur's jovial rotundity—not to mention his ability—would entitle him to anything. Any depression of his spirits would be a distinct loss to the community. Everyone will be glad that he has not been overlooked.

Mr. Killam is a sound and able lawyer. The profession would heartily welcome his appointment to the bench, and notwithstanding rumors to the contrary, we still hope that he may be induced to accept the position.

It has been said that three other gentlemen have been selected for distinction. We hope that the rumor is true so far as it relates to Mr. H. M. Howell. If numbers of briefs supplied a claim, Mr. Howell would take first place.

To the disappointed let us say, that a patent of precedence, like the forgiveness of sins, comes not by merit but by grace; and that if there are two lists upon which a name may or may not be, the mathematics of probabilities are against the chance of it being upon both.

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REGINA v. HODGE.

THE decision of the Privy Council—that the Provincial Legislatures have power to impose the punishment of imprisonment *with hard labor*—has been sharply criticized by *The Canadian Law Times, The Legal News, The Law Journal* (Eng.) and *The Criminal Law Magazine.*

The two journals first named have each a preliminary objection to urge. Their criticisms will shew how impossible it is to please everybody or even all legal editors.

The Canadian Law Times finds fault as follows:—"If their Lordships of the Privy Council had confined themselves within the limits which they assigned themselves in giving judgment in this case, or if, at any rate, in overstepping their boundaries they had not transgressed the opinion of eminent authorities on criminal law, the judgment would have commanded more admiration and respect. The limits which they assigned themselves are those laid down by Hagarty, C. J. in another case, viz. 'That in all these questions of *ultra vires* it is the wisest course not to widen the discussion by discussions not necessarily involved in the decision of the point in controversy.' Now the constitutional question before the court was the right of the Legislature to create such a subordinate legislative body as the License Commissioners; the question whether the Legislature could

impose the punishment of hard labor in addition to imprisonment was not properly before them, nor was its decision necessary for the disposal of the appeal; yet their Lordships give their opinion upon it."

The Legal News has a somewhat different objection. After quoting the language of Hagarty, C. J. (*ante*) it proceeds as follows:—"It is as difficult to accept such generalities as to contradict them. In order to deal with them it is necessary first to determine their precise meaning. It may safely be assumed that what is meant is, that in interpreting a statute of the nature of the B. N. A. Act the courts should specially refrain from generalizing its terms. We contend, with all due deference, that *this is a fundamental error*; the true principle being that the whole scope of the Act has to be constantly kept in view so as to co-ordain the powers of both governments."

The latter objection is founded upon a misconception of the meaning of the words criticized, and the former upon a misconception of the case itself. The words mean no more than this, that when one point on the statute is raised the judges should not decide other points, and with this meaning they are unobjectionable. But it is said that although the Privy Council tried to observe this simple rule it was unable to do so. This strikes one as improbable. Surely if their Lordships made a real and conscientious effort to refrain from deciding a point the chances are that they would accomplish their purpose. The *C. L. T.* however says they made a total failure of it and have given judgment upon a point they had no right to meddle with. Let us see. For committing a breach of a by-law of the License Commissioners the defendant was condemned "to be imprisoned in the common gaol of the said City of Toronto and County of York, and there be kept at *hard labor* for the space of fifteen days unless &c." A rule *nisi* was obtained to quash this conviction upon various specified grounds, but the objection that the Legislature had no power to impose imprisonment with hard labor was not taken in the rule. The point was however taken upon the argument before the Privy Council,

was debated by both sides, and if held good would have been fatal to the conviction. The Privy Council might indeed have disposed of the objection by refusing to allow argument upon any point not taken in the rule and so left the case as to such point undetermined, but every one surely will agree that it is better to completely dispose of a case when it is possible to do so; and, when no embarassment can accrue, not to bind down either party to the objections originally put forward.

Upon the main question, viz: whether under the B. N. A. Act the Legislatures have power to decree imprisonment with hard labor, all four journals agree that the Privy Council is wrong. With a good deal of industry they have shown that jurists and judges have always treated imprisonment with hard labor as something more severe than simple imprisonment. And we hardly think they will find in the Privy Council a lord who would wish to dispute this point with them. With similar care they have also proved "that no court can impose hard labor as a condition of punishment unless this power be specially granted by statute". This too is no doubt sound, but neither it nor the former proposition in any way conflicts with the judgment of the Privy Council.

Sec. 92 of the B. N. A. Act is as follows:—"In each Province the Legislature may exclusively make laws in relation to matters coming within the *classes of subjects* next hereinafter enumerated, that is to say:—

(15). The imposition of punishment by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section."

The Legal News therefore is quite correct when arguing that "It was comparatively easy to indicate in *general* terms the powers of each government and this is what was done. No one ever seriously contended that even the catalogues of sections 91 and 92 were perfectly conclusive. Therefore there must exist a doctrine resulting from, but undeveloped in, the words of the Act". This quotation is not, of course,

found in that part of the argument which is devoted to proving that the Privy Council is wrong in saying that the terms used are "very general terms". It would have been a little out of place there. But it is nevertheless indisputably true.

When a statute gives jurisdiction to a court it is accomplished with some attempt at accurate limitation; but in the distribution of legislative powers among legislative bodies schedules of "classes of subjects" or headings of jurisdiction are the only practicable means of giving expression to the intention of Parliament. Let us for a moment take the words as expressing a precise limitation and not as a heading of jurisdiction—let us in other words assume that the words are applied to a court and not a Legislature. The Legislature, in this view can only impose punishment by fine, penalty *or* imprisonment. It cannot for the same offence impose a fine *and* imprisonment. *M. S.* v. *Vickey 1 Har. & J. 427; State* v. *Kearney 1 Hawks. 53; Wilde* v. *Commonwealth 2 Met. 408.* The Legislature may impose imprisonment but it cannot compel the prisoner to pay the costs. It can impose a fine but it cannot award distress or process of any kind for non-payment. These considerations show at once that the words must be taken as headings of jurisdiction, and "Imprisonment" when used as a heading must include that which is usually incident to it, otherwise the Legislatures are without powers which beyond question it was intended they should possess.

But we imagine our contemporaries still clinging to the word *imprisonment* and telling us that we want to add "with or without hard labor" to it. It is certainly possible that the Imperial Parliament in passing the B. N. A. Act may have determined that the Provincial Legislatures should not have power to award or inflict hard labor upon any of Her Majesty's subjects, and our friends will urge that to do this it was only necessary not to bestow the power, and it was not necessary to enact that the power should not exist. We will grant the point for the sake of the argument which follows. The Provincial Legislatures are empowered by the

B. N. A. Act to make laws concerning " The establishment, maintenance and management of public and reformatory prisonsin and for the Province ". It must therefore be within the power of the Legislatures to regulate the discipline of the prisons to which all breakers of Provincial laws are to be committed, and they have power to require those incarcerated to work for their living and to prevent them by habits of inactivity and laziness becoming more vagabondish than before their arrest. Prisons are not now as in the days of old mere dismal dungeons in which the prisoner risked his reason for lack of employment but are in large sense reformatories, places where habits of industry and usefulness are inculcated—where hard labor is part of the daily routine. Prisons in the Province of Ontario are not behind the age in this respect and its prisons to-day are peculiarly industrial, if at the same time penal, establishments. (That the Legislatures have power to make laws regulating the discipline of prisons is a fact probably not present to the minds of the writers in *The Law Journal* (Eng.) or *The Criminal Law Magazine* and may probably suffice to change their opinion upon the subject. With a hope for their conversion we continue the argument.) There is no doubt that if a court has power to imprison only, the prisoner may nevertheless be subjected to hard labor if that be a part of the discipline of the prison to which he is committed. Our contemporaries supply us with authorities for this proposition. Stephen's definition of imprisonment is as follows :— " The punishment of imprisonment consists in the detention of the offender in prison, and in his *subjection to the discipline* appointed for prisoners during the period expressed in the sentence ". *The Criminal Law Magazine* says, " It is true that *where labor is part of the discipline* of a particular prison, then parties committed to such prison are obliged to submit to such discipline, though it is not part of the specific sentence ". *The Canadian Law Times* admits that where imprisonment is defined as the restraint of a man's liberty simply, " Conformity to prison discipline is of course implied. *It is incident to imprisonment ;*" and then it innocently asks " Are we, however, to infer from the judgment now in

review, that a man sentenced to imprisonment may be set at hard labor as an incident of his punishment?" Well, if "it is incident to punishment" we cannot see why the man should not be set at it "as an incident of his punishment." Do you, *C. L. T.*?

Let us now see how the argument stands:

It is asserted and denied that when power was given to the Legislatures to punish by imprisonment that power to imprison with hard labor was not intended to be included—that it was not intended to give the Legislatures power to administer hard labor as a punishment for offences against Provincial laws.

It is admitted that imprisonment with hard labor is a more severe punishment than mere imprisonment.

It is admitted that if the words in question were used in conferring jurisdiction upon a court, the court would have no power to impose hard labor.

It is admitted that the powers assigned to the Legislatures are expressed in general terms but it is contended that punishment by "imprisonment" is specific and not general.

It is proved that the Legislatures have power to prescribe hard labor as part of the discipline of the prisons to which offenders against Provincial laws are confined.

It is proved therefore that the legislative jurisdiction of the Province is sufficient to bring about the imprisonment with hard labor of offenders against its laws.

It is therefore proved that it was not intended by the B. N. A. Act to exclude from Provincial jurisdiction the power to impose imprisonment with hard labor.

And it follows that when power was given to imprison, and that power is found among clauses in which jurisdiction is given in the lump rather than specifically, the words must be taken as heading a jurisdiction and inclusive of all that which is usually incident to the power given—"with all the appurtenances thereto belonging or in anywise appertaining or with the same usually held, used, enjoyed or taken or known as part or parcel thereof".

STATEMENTS BY PRISONERS AND THEIR COUNSEL.

IT is strange that a question which might be raised upon every criminal trial should still remain unsettled. Can a prisoner, although not permitted to give evidence, state to the jury his own version of the facts? In the O'Donnell trial Mr. Russell proposed to state his instructions to the jury. He was not permitted to do so. After the trial the Attorney-General addressed a letter to the Lord Chief Justice upon the subject, to which the following reply was sent :—

ROYAL COURTS OF JUSTICE, Dec. 4, 1883.

My Dear Mr. Attorney-General:—I entirely agree with you as to the practical importance of the question you have brought to my attention. The paper I enclose will show you it is no new subject to me. Immediately after the trial of Lefroy at Maidstone, in which, as you may remember, Mr. Montagu Williams claimed to do what Mr. Russell did, I brought the matter before the judges, with the result which the paper enclosed will show you. At Maidstone the opinion of Lord Chief Justice Cockburn was said to have been founded on or supported by Lord Justice Lush and Mr. Justice Hawkins. Both those learned judges were present at the meeting called by me, and both disavowed in the strongest way ever having ruled or being inclined to rule in the manner suggested. Mr. Justice Denman authorizes me to say that if he had remembered the very strong judicial which I enclose he should have acted on it, and have refused a case if one had been asked for. Mr. Justice Stephen authorizes me to say that he should, as at present advised, not vote against the rule as formulated by the Master of Rolls, but approves of it, and should act upon.

My reason for bringing the matter before a meeting of the judges was this—that directly after the passing of the

Prisoners' Counsel Act, Lord Denman, the then Chief Justice, called the judges together, and they (as appears from the Judges' Book) agreed upon a course of practice which has always since been followed. It seemed to me that the question discussed in your letter was one of practice also, and that the best way of settling it was to pursue the course I took. Perhaps it might be well to make this resolution generally known, as there may be considerable difficulty in making the question the subject of a case reserved. Generally, I agree with you that the practice is wrong and not to be permitted, and that if permitted at all, it must, in justice and fairness, carry with it the right of reply on the part of counsel for the prosecution. Believe me to be, my dear Mr. Attorney-General, your obliged and faithful servant.

[Signed] COLERIDGE.

THE ATTORNEY-GENERAL, Q. C., M. P.

The paper enclosed was as follows:—

At a meeting of all the judges liable to try prisoners, held in the Queen's Bench room on November 26, 1881 (Present —Lord Chief Justice Coleridge, Lord Justice Baggallay, Lord Justice Brett, Lord Justice Cotton, Lord Justice Lush, Lord Justice Lindley, Justice Grove, Justice Denman, Baron Pollock, Justice Field, Justice Manisty, Justice Hawkins, Justice Lopes, Justice Fry, Justice Stephen, Justice Bowen, Justice Mathew, Justice Cave, Justice Kay, Justice Chitty, Justice North), Lord Coleridge stated the subjects for which the meeting was summoned, and Lord Justice Brett moved the following resolution: "That in the opinion of the judges it is contrary to the administration and practice of the criminal law, as hitherto allowed, that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to put in evidence."

Justice Stephen moved the following amendment:— "That in the opinion of the judges it is undesirable to express any opinion upon the matter."

This amendment, having been put to the meeting, was negatived by nineteen votes to two. The original motion

was then put, and carried by nineteen votes against two (Justice Hawkins and Justice Stephen *diss.*). The question of the propriety of laying down a rule as to the practice of allowing prisoners to address the jury before the summing up of the judge, when their counsel have addressed the jury, was then considered, and after some discussion was adjourned for further consideration.

Mr. JUSTICE WILLIAMS afterward sent the following letter to the *Times* :—

SIR,—There seems to be a considerable, though, perhaps, not an unnatural misapprehension as to the nature and effect of the recent resolution adopted upon the above subject at a meeting of the judges.

So far as I am aware, this resolution is not, nor is it considered to be, binding upon any non-assenting person. It does not profess to be the enactment of a rule of practice, nor a 'decision' upon any point of practice or procedure, much less upon any question of substantive law. It is nothing more than a private and purely informal expression of opinion elicited from a certain number of the circuit-going judges as to what the practice had theretofore been according to their experience. It was not even a declaration of opinion by the judicial body as such, as I shall show in a moment. I was a member of the bench at the time, but I was not present at the meeting, from what cause I have no recollection. I never received any notice of any one's intention to propose such a resolution, nor have I ever to this day received any notice of such a resolution having been adopted, and I was in entire ignorance of its existence until the fact came to light in the course of the recent discussion that followed the O'Donnell trial. In the meantime, the question had several times arisen before myself; and under the impression that I was acting according to the accepted practice, as it had been laid down by Lord Chief Justice Cockburn, I allowed the prisoner, by the mouth of his counsel, to state his version of the facts to the jury without proof. And, in addition to this, I never refused liberty to a prisoner to make a further statement himself if he desired it.

The truth is, that there is not the slightest foundation for the statement which I have seen published—that the judges have attempted or desired to settle and determine in secret conclave and without public discussion or argument, even so little as a question of practice and procedure; and perhaps the statement scarcely deserves serious contradiction.

For my own part, I own that there seems to be a great practical objection to allowing a prisoner to state through counsel facts that he does not propose to support by evidence. If a prisoner, in his defence, desires to state facts which he is not in a position to support by evidence, he ought to be allowed free scope to do so. He is not permitted by law to give evidence, and it would be most unjust and even inhuman to restrict him giving his explanation. But if this explanation, woven, perhaps, skilfully and ingeniously, is presented through the mouth of counsel, this evil consequence immediately follows—that the Court and jury are without any sufficient guarantee that the full, unqualified statement of the prisoner is placed before them, because a cautious and skilful counsel might naturally be expected, as indeed it would be his duty, in framing the defence, to omit whatever might appear to him to amount to damaging admissions or silly and contradictory reasoning. This weak point tends to destroy the moral effect of unproved statements made through the mouth of counsel, a result which, in the case of a really innocent prisoner, may be deplorable. A remarkable instance of this occurred before myself quite recently. In a simple and apparently clear case against the prisoner, the counsel for the defence gave, without offering any proof, an extraordinary explanation of the affair with which the prisoner had furnished him; he did so in a most able and justly-reasoned speech; but it was evident to everyone that the explanation thus presented appeared to the jury more plausible and ingenious than probable. The summing up to the jury was concluded, when the prisoner appealed to me to know whether he could say something. I told him, certainly—that if he had anything to tell us that had not already been stated, he was at liberty to mention it to the jury now. He then, in a very simple and artless way,

told his story, which was evidently the basis of his instructions to counsel; but there was this important difference—that he frankly admitted an important and apparently damaging fact that had been conclusively established by the prosecution, but strenuously disputed by his counsel. But he told the whole story in such an artless fashion, and with slightly altered circumstances, that he threw an entirely new and unexpected light over the whole affair, and evidently deeply impressed the jury as well as the others. Certain of the witnesses were recalled at the instance of the jury, and interrogated respecting the new aspect of the question, with the result that the prisoner, who before his statement stood in decided peril of conviction, was immediately acquitted.

The recent discussion upon this subject seems to have brought to light the fact that it certainly has not been the general practice, when a prisoner has been defended by counsel, for him to be allowed to state without proof, through the mouth of counsel, any facts he may think fit to instruct his counsel to state and the latter may consider it prudent to repeat.

It seems to me also impossible to dispute that it is and ought to be the right of the prisoner, even when he is defended by counsel, to offer without proof any explanatory statement of his own; and for my own part nothing short of an Act of Parliament will ever induce me to deprive a prisoner of this right whenever he demands it, whether before or after his counsel's speech, or after the summing-up of the judge or even the deliberations of the jury.

I am, your obedient servant,

Beddgelert, Dec. 27. WATKIN WILLIAMS.

To this letter BARON BRAMWELL, writing over his initial "B.," sent the following reply:—

"SIR,—In his letter to you Mr. Justice Williams says a prisoner 'is not permitted by law to give evidence, and it would be most unjust and even inhuman to restrict him in giving his explanation.' With submission to his lordship, there seems some confusion here. If 'explanation' means explanation of the facts already in evidence with no addition

to them, nobody has ever doubted the right of a prisoner to give such explanation. If 'explanation' includes placing additional facts before a jury, as thus, 'I explain my knocking down the prosecutor by saying he first knocked me down,' then it would be as well to call the thing by its right name. What his lordship really means is this. The prisoner ought to be allowed to state things he cannot prove. What is this but to give evidence, which, however, his lordship expressly says the prisoner himself is not 'permitted by law to do.' What the prisoner says, his explanation as his lordship calls it, is to influence the jury or it is not. In the latter case it is idle. If it is to influence, it is by the alleged existence of new facts. The result is, the jury will have before them evidence on oath, and which has, or might have, been cross-examined to, and evidence not on oath, and without the wholesome check of cross-examination. His lordship says that nothing but an Act of Parliament will induce him to deprive a prisoner of this right when he demands it. Nothing but an Act of Parliament ought to induce a judge to deprive a man of a right which would otherwise exist. But does this right exist? I say No, and that there is no precedent or authority for it, nor better reason for it than this—that because a man is not permitted to give evidence with the ordinary securities for its truth, he must be permitted to give it with no security. There is a fine high tone in his lordship's letter; but I would humbly suggest he should take the opinion of the Court of Criminal Appeal as to whether he is right.

Your obedient servant. B.

MR. JUSTICE WILLIAMS closes the correspondence:—

SIR,—Will you permit me to point out one or two inaccuracies of fact which have crept into the correspondence upon this subject, and which have confused and obscured the discussion of the practical question?

First, the assumption made by 'B.,' and adopted by others, that the opinion expressed by me in my letter to the *Times* is at variance with the resolution adopted at the meet-

ing of the judges in 1881 is really not correct; there is, in fact, no foundation whatever for it. The cardinal proposition for which I so strenuously—perhaps too strenuously—contended was that every prisoner has the right by law to defend himself by telling his story, introducing, if necessary, fresh facts, although he is not in a position to produce evidence in support of them. This proposition was categorically denied by 'B.' I, however, had gone one step further by asserting that this right was not taken away by the defence being conducted by counsel. This sub-proposition was naturally not adverted to by 'B.,' because no such question could arise if the right itself did not exist, as 'B.' holds. The resolution of the judges is in the following terms: 'That, in the opinion of the judges, it is contrary to the administration and practice of the criminal law as hitherto allowed that counsel for prisoners should state to the jury as alleged existing facts matters which they have been told in their instructions on the authority of the prisoner, but which they do not propose to prove in evidence.' The only opinion expressed by me upon the subject of this resolution was entirely in agreement with it, as appears by my letter.

A further question was raised at the same meeting of the judges as to the practice of allowing prisoners to address the jury when they are defended by counsel. No decision was arrived at, and the consideration of the question was adjourned *sine die*. The question of the prisoner's right when not defended by counsel to make a statement of facts which he has no means of proving was not even raised or discussed. There appears to be a general, if not complete unanimity of opinion upon the only resolution adopted upon this question by the judges, and there is no ground for the assertion that any opinion expressed by me is otherwise than in complete harmony with that of my brethern on the bench; and upon the other points discussed there appears to have been no general expression of opinion by the judges, either by resolution or otherwise.

Secondly, some of your correspondents have taken it for granted that meetings of the judges and of the council of

judges and of the body empowered to make orders and rules of court are one and the same thing. This is certainly not correct. They are three entirely different things. From time immemorial meetings of the judges have been held for the transaction of matters too numerous to detail, and at these meetings it has been customary to discuss disputed questions and to pass resolutions thereon. These resolutions, although of imperfect obligation and wanting the force of judicial 'decisions' or 'rules of court,' have nevertheless been found of great practical value as guides for future action.

The council of judges and the body empowered to make rules of court are entirely different from the first and from one another. They are created by statute. Their resolutions and rules and orders respectively, assuming them to be *intra vires*, are binding to the extent and in the manner provided by the statutes.

Your obedient servant,

January 11. WATKIN WILLIAMS.

THE MANITOBA LAW REPORTS.

THE Canadian Law Times suggests that the Manitoba Law Reports are occasionally "a faithful reproduction" of cases reported in its columns. We did reproduce one case, *Reid* v. *Whiteford*, but we carefully added "Above case and note are taken from *The Canadian Law Times*." This case was of importance to the profession here, and as our omniverous friend had secured the manuscript prior to the commencement of our reports, in a weak moment we determined to steal. The fact that having many sheep of our own we took the poor man's only lamb, of course adds heavily to the offence. Our contrition requires more than printer's ink. Pitiful reader, kindly imagine the writer prostrate on the ground, overwhelmed with sorrow, dust, ashes, and sarcasm.

The only other case in which there could be a suspicion of plagiarism, is the case of *Caston* v. *Scott, 1 M. L. R. 117; 4 C, L. T. 151.* The grossest reprobate, hugging his new-born innocent to his bosom and swearing to the faithfulness of the reproduction, could not be more astray than is our suspicious friend in this instance. The question for decision in the case was, whether the ownership of unincumbered real estate in the Province was a sufficient answer to an application for security for costs. *The Manitoba Law Reports* gives the conclusion of the judge as follows: "it would not be *unreasonable* to say, that where the plaintiff owns real property, a mortgage, given to an officer of the court, conditioned to be void upon payment of a certain sum should costs be awarded against him, should be accepted." *The Canadian Law Times*, on the contrary, makes the learned judge say that "it would not be *reasonable* to say that where the plaintiff owns real property, a mortgage given to an officer," &c.

We need hardly add that *The Manitoba Law Reports* are correct, and that our inter-provincial friend is not more free from criticism in his reporting than in his advertising columns. If the reason of his errors really is attributable to lack of financial support (as our unfortunate friend seems to suggest), we will be glad to undertake, without charge, for a reasonable time, not only the inspectorship of his advertisements (a position he seems to be desirous we should assume), but also the supervision of his whole publication. We think that an impecunious friend ought always to be assisted—that is, of course, with advice. Perhaps, in advance of our installation in office, he will allow us to suggest the adoption of the somewhat useful page usually headed—"*Addenda et Corrigenda.*" It would be an evidence of the editor's honesty and of our industry. Let it be in this form:—

Page 152, *line* 7 *from foot—for* "it would not be reasonable to say," *read* "it would not be unreasonable to say."

MR. JUSTICE SMITH.

ALTHOUGH not actually gazetted, it seems to be generally understood that Robert Smith, Esq., Q.C., of Stratford, Ont., has been appointed to the vacant judgeship. The feeling against the appointment of anyone outside of our own bar is very strong, and found vent the other day in a rousing cheer which made the court house ring again when a *Canada Gazette* was produced containing Mr. Smith's appointment to the deputy judgeship of the County of Perth instead of to the Manitoba Court of Queen's Bench. This was taken as evidence that no appointment had as yet been made to our court. We are informed, however, that the appointment has in fact been made, and that Mr. Smith's judicial employment in Ontario is merely temporary.

Of Mr. Smith we personally know nothing. He is reported to be a good lawyer, possessing a clear, logical and judicial mind. He, moreover, has the first requisite of a judge—he is a gentleman. Lord Ellenborough said that in selecting a judge, "care should be taken to appoint a gentleman. If he knows a little law so much the better." Apart from Mr. Smith's domicile we would, judging from report, approve the appointment. But it is humiliating to be (in effect) told that out of our whole bar there is not one fit to be a judge—that Manitobans are less advanced than the natives of India, from among whom her judges are now frequently appointed. But we should think that it was not advisable that a judge should be much superior to the bar. It is apt to spoil both judge and barristers, to render the former imperious and overbearing and the latter subservient and useless. Perhaps this view of the matter did not occur to the Dominion Government. If we are a poor lot we should be helped and not snuffed out. Mr. Justice Smith will have to try and bear with us,

THE

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VACATION AND TERM.—THEIR ORIGIN.

TIME:

Orl.—"*Who stays it still withal?*"

Ros.—"*With lawyers in the vacation for they sleep between term and term and they perceive not how time moves.*"

AS YOU LIKE IT.

PERHAPS the earnest law student is the last man in the world who has time to unravel the myriads of little mysteries constantly encountered in the study of the law. Nor is it absolutely necessary, provided he occupy his time in training his mind to grasp the great principles of law and their application that he should exhaust his nerve centres in mastering all the trifling incidentals. He may submit to being befogged by incomprehensible snatches of Norman French—often snipped from the preambles of musty old statutes—with impunity. Many a time when perusing the involved sentences of some old text writer he would fain come *de profundis* into the light, but his confusion is sure to be worse confounded by a free libation of Church Latin poured from the pages of some old ecclesiastic whose justice would have been tempered with mercy had subsequent text writers clothed it in the less fashionable garb of unpretending English. Often in such cases would the impulse be to slam the book together, cry aloud *obscurum per obscurius!* and dash Tom I. or Tom

II. into the middle of next week, Hades, or—to provide against the possibility of a second encounter—into some less committal place, say Valhalla, the resting place of the Scandinavian warriors. [It will be noticed that the words used above are "perhaps the earnest law student is the last *man*," and it may be as well to say that the italicized word has been used advisedly, for has it not been decided that an attorney's clerk should not be described as a "gentleman?" *Tuton* v. *Sanover, 3 H. & N. 280; Beales* v. *Tennant, L. J. 29, Q. B. 188; Brodrick* v. *Seale, L. R. 6 Q. B. 98.*]

One of his first difficulties will be to obtain a clear idea of the succession of the various terms and vacations; this is sure to seem awkward at first, but before long the beginning of a vacation will loom up like a workman's dinner hour, and he will predict the very moment when it is bound to arrive. Not only will he know that Christmas vacation comes between Christmas and Hilary terms, Easter between Hilary and Easter, etc., but he will be able to tell glibly when every one of the terms begins and the exact day of its ending. Having accomplished this, one is sure to feel considerably relieved, but not wholly satisfied. There is a churchy sound about the names of the terms, that seems unaccountable. The first impulse is to exclaim what "in the name of the evil spirits of the Hartz Mountains" had St. Michael, St, Hilary and the boiled-egg-season to do with motion papers and rules nisi? How came we by term and vacation, and what led to the present arrangement by which Christmas vacation is sandwiched in between St. Michael and St. Hilary, etc.?

In 1873 a good deal was said about a proposed shortening of the long vacation in England, and soon after the adoption of the Judicature Act in Ontario the judges of that Province recommended that the midsummer vacation be extended to the first of September. One would be inclined to think that having ascertained the reasons given now-a-days for varying the vacations some clue would have been obtained to their origin and first arrangement, but

what do we find?—that the shortening of the English vacation was strenuously opposed because a number of noble and distinguished lawyers and judges (*Can. L. J., vol. 10, p. 330*) had died of overwork, and that the lengthening of the Ontario midsummer vacation was called for (*Can. L. T. vol. II. p. 97*), "because two months is not a very long time for a partial rest" for—the lawyers. Let the curious read as they will and the main consideration will be found to be "the lawyers"—the lawyers must "sleep between term and term"—but what ideas can be more opposed than "the lawyers" and *saints* (*Mrs. Grundy, Passim*); even St. Michael and St. Hilary, they (the curious) will be further than ever from the object of their search.

It seems to be an accepted matter of history (*Holly's Blackstone*) that for the origin of our term and vacation it is necessary to go back to the *dies fasti* and *nefasti* (business days and holidays) into which the whole Roman year was divided (*Ovid; Fast, vv. 145, Wharton's L. Lex. p. 301*); an arrangement of the year said to have been instituted by Numa Pompilius. On the *dies fasti* the praetor was allowed to administer justice in the public courts, but *dies nefasti* were holidays, when the court doors remained closed, and litigation was at a stand still. For a long time this custom of the Romans, like many others of the same origin in our early law and observances, held sway, but with the rise of Christianity and a consequent antipathy to Roman superstitions and fasts, this artificial partition of the year was disregarded and the twelve months were given up indiscriminately to litigation.

The Christians themselves having cleared away the older fabric were not long in erecting a new one in its place. The Church interjected a few holy seasons during which litigation was strictly prohibited. Advent and Christmas among these corresponded to the winter vacation, Lent and Easter to the spring vacation, and Pentecost to the third, while—perhaps from having a heavy interest in tithes and other fractional parts of the crop—a separate Church edict

required that hay time and harvest be not interfered with, and for this purpose the long vacation between midsummer and Michaelmas was first instituted. (*Blackstone quoting Spelman of the Terms, and Rymer's Feodera.*) This arrangement was "established by a canon of the Church A. D. 517, and was fortified by an imperial edict of the younger Theodosius," and these prohibitions seems to have been kept in view in all subsequent statutes; e. g., in the time of Edward the Confessor, "no secular plea could be held and no man sworn on the Evangelists during Advent, Lent, Pentecost, harvest and vintage," but later (*Stat. West. I., 3 Edw. I. c. 51*) under special circumstances certain business was allowed to be gone on with in Advent, Septuagesima and Lent, "by the assent of all the prelates," and that "at the special request of the King to the bishops." In this way arose the four vacations or periods of no work for the lawyers, at that time imposed upon the profession from without and no doubt whether they liked it or not; it is a curious change in circumstances to contemplate—the vacations at one time *imposed* in the interests of the Church, harvest and vintage, are now regarded by the profession as a right, a time for recreation, a time *far niente*, when the voice of the court crier is dumb and the twelve "honest men and true" are devoting their entire attention to the cultivation of their tubers, and "toiling in the grain." The influence which agriculture—at that early time almost the one absorbing employment, had in determining the allotment of the parts of the year may be gathered from the following quaint words taken from Coke on Littleton ("The First Part of the Institutes of the Law of England or a Commentary upon Littleton, not the name of the author only but of the law itself,") (*page 185, ch. 11*)—"As to Trinity tearme it sometimes had seven days of return and was as long as Michaelmasse tearme is now; but for avoyding of infection in that hot time of the yeare and that men might not be letted to gather in harvest three returnes * * become dies non juridice." Corresponding to the four vacations were the four terms, Hilary, Easter, Trinity and Michaelmas, the

first called after a festival immediately preceding it and held in honor of a French bishop, the second named from the well-known feast of the Passover, and the remaining two also after festivals immediately preceding them. In this way term and vacation seem to have arisen. Many changes as to time and procedure mark the statute books, and numbers of old observances may have grown obsolete, but these are impertinent to the present subject. It has often been said that the strict observance of the first day of the week, which was instituted by the Sabbatarian sect at the close of the sixteenth century, (*Hallam Con. Hy. of Eng. p. 282, and foot note,*) will be kept up for sanitary and other reasons even should the old reasons cease to have weight, and it seems safe to predict that whatever may have been the origin of the long vacation it will continue, if for no other purpose, in order that lawyers may "sleep between term and term,"

F. C. W.

MARRIED WOMEN.

IF women desire the franchise and other privileges they must be content to accept corresponding obligations and among the rest the duty of paying their creditors, with the alternative of executions in the sheriff's hands. They may, perhaps, complain that they are getting the burdens faster than the benefits, and the recent decision in *Wishart* v. *McManus*, *1 Man. L. R.*, does seem to supply them with something more rocky than the fish they were asking for. It will, however, furnish them with another argument, and, it seems to us, a very good one, for their enfranchisement.

In Ontario the judges have been for years struggling with the question of the liability of married women, and after many doubtings and debatings they seem finally to have reached a very illogical conclusion. A married woman is not liable upon her contracts and cannot make

herself liable if she tries; she is a married woman, and is supposed to be so much under the domination of her husband that she cannot, in her own interest, be permitted the right to contract. If she had the power to do so she would be speedily ruined and despoiled. At the same time she can do as she likes with her separate property, and that with the greatest facility. Her powers are far larger in this respect than those with which the law has thought proper to entrust her husband. He, poor soul, is hedged all round from frauds and perjuries with the Statute of Frauds. No one shall say that his property is mortgaged unless the assertion can be proved by his signature or at least by production from deposit of his title deeds. A married woman, on the contrary, can effectually charge her whole estate by signing a promissory note or ordering a new dress. The property, then, which is already subject to the husband's debts, obligations and control, which is not separate estate, cannot be made liable for a married woman's contracts; but her separate estate, that which is free from her husband's control, which should be protected if there is to be any protection, can be mortgaged by word of mouth and without her knowing what she is doing.

Learning, and not common sense, must supply the justification of this conclusion. It may be that a married woman, having been unable to bind herself at law, must have been held to have intended to charge her separate estate when she signed a note, and that the contract having been partially executed by the loan of the money equity enforced the charge. Payment of money, however, never was such a part performance as removed a contract relating to land out of the Statute of Frauds, and, if it were, why should a married woman have been permitted to divest herself so easily of her property while the law assumed her to be so specially weak and imprudent.

The solution is, as usual, historical, and the history being as yet, in Ontario, incomplete, the position there is unsatisfactory and illogical. At law a married woman was a part of her husband and her property became to a large extent

his. Equity, however, deeming this unjust, was accustomed to declare that certain property of a married woman was her separate estate and with regard to it treated her as a *feme sole*. Down to the commencement of the Married Woman's Acts the doctrine of separate estate was unknown to courts of law. After much difference of opinion it was (in Ontario) determined that the effect of those Acts was to introduce into courts of law the equity doctrine of separate estate; and that although the statutes declare that a married woman is to be liable as a *feme sole*, they only mean that she is to be liable as a married woman used to be in a court of equity.

In passing we would like to suggest that, in any case, the form of judgment in use in Ontario in actions against a married woman is unfair to the plaintiffs. The form gives execution against all the separate estate which the defendant had at the time the debt or liability was incurred and which is yet undisposed of. We submit, with all the deference due to that superior Province, from which we must expect for all time to import our judicial ability, that the plaintiff is entitled as against the defendant to a charge upon all the separate property which she had at the time when the debt or liability was incurred whether it has subsequently been disposed of or not; and that the plaintiff is then at liberty to contest priorities, upon the ground of notice of his charge or otherwise, with the persons who have acquired interests subsequent in point of time to his.

Wishart v. *McManus*, for Manitoba, relieves the law of all incongruities and inconsistencies. If a married woman contracts she is liable as if she were a *feme sole*—that is, judgment may be obtained, and execution issued, against her personally. This is extremely satisfactory, and we are not sure that we are not much indebted for the result to the able arguments of the members of the bar who were engaged in the case, one of whom received special compliment from the court. The Ontario bar should really look into these questions a little more thoroughly. Judges will go wrong unless assisted by debate.

REVIEWS.

WE have received from the author "A Law Treatise on The Constitutional Powers of Parliament and of The Local Legislatures under The British North America Act, 1867," with the requests: "Please review and forward me a copy," and "Please name that the work will be sold at $1.50 per copy; with discount to the trade."

The author is J. Travis, Esquire, LL. B.; and the title page informs us that he is of the New Brunswick Bar; that he is the annotator of Parsons on Partnership; that he was the First Prize Law Essayist of Harvard University, of 1866; and that he has written leading law editorials in the *American Law Register* (of which the Hon. Chief Justice Redfield, who is the author of "Law of Wills," "Law of Railways," &c., is editor,) on Origin and History of the Common Law; Jurisdiction of the United States Federal Courts; Common Law Jurisdiction of the State Courts, &c., &c.

Now we submit that this is altogether unfair. We are barely six months old, and how can we be expected to review a man with a history like that? A man who wrote an essay when he was at college, and spends his later life in writing editorials in a law journal, of which a Chief Justice is editor; a man who is an Esquire and an LL. B., and who can fill 184 pages with abuse of all the judges he knows (except two, one of whom he worships,) interlarded with sufficiently long quotations from their judgments to make themselves the witnesses of their own unmitigated stupidity. Surely, a man who has knocked the Privy Council out of all law and reason into bad grammar and absurdity, is beyond review, and can only be humbly and devoutly canonized.

We always desire, however, to comply with polite requests, but we are going in with Dr. Faust—for love of fame we resign ourselves to perdition—we will have a Guiteau immortality.

At the very outset, however, we must admit our ignorance and confess that we have never seen "a legal analyst," (122); and that, therefore, when we undertake to dissect one we assume a task wholly beyond our ability.

A "legal analyst," we should think, must be one authorized by law to analyse; just as an illegal analyst would be one not by law permitted to practise. We feel sure, however, that this cannot be the true explanation. Try analogy! There are milk analysts? Yes, but no milky ones that we know of! Well, there are chemical analysts? Yes, they use chemicals in their work; but surely law would be of no service in a laboratory! Are there medical analysts? No. Then there are mineral analysts, or assayers rather—iron analysts? Yes, and perhaps irony analysts—or ironical analysts! This may be the right track—we will inquire.

And first of all, "a legal analyst," in his methods, treats "the arguments of those with whom we (he) comes in contact .... as though we (he) were fairly criticizing a book without the remotest conception in the world as to who might be its author" (98); at least the specimen in hand says that that is the way he endeavors to proceed—"removing all of error about those opposing claims, as far as we are able to do so, no matter by whom made; set forth, honestly and faithfully THE TRUTH" (93).

Then, a "legal analyst" is not a politician. but a patriot and a philanthropic teacher. "In continuance, recollect, of the same line of argument, which we—not as a politician, but simply as a legal analyst—have fairly placed before our readers, in our honest, and, say patriotic, effort to remove the ignorance and uncertainty in which many of the statesmen, politicians, judges and lawyers of this Dominion have been so apparently hopelessly involved...." (111).

Correct grammar is not a necessary qualification of "a legal analyst," but emphasis is wholly indispensable. A schoolmaster who learned the rules of grammar after he acquired habits of incorrect expression might be "a legal analyst;" one who could seize upon a doubtful sentence

penned by a privy councillor, but who would refer to a principle "which *lays* at the bottom of the rule of construction," (152), and experiment on the plural of subject-matter, trying first *subjects-matter* (6), then *subjects-matters* (10). (An ordinary mortal would have tried the third alternative, if it were only to see how it would look.)

Italics and capitals, spacing and display headings are distinguishing characteristics of "a legal analyst." We had been accustomed to think that too free a use of such adventitious props to language were a sign of poverty of expression; but when the point is worked out it becomes quite clear that when one undertakes to make "THE TRUTH" apparent, the best way is to use capitals and large type—the dimmest eye will thus be accommodated. An example or two will show the beauty and benefit of the system: "the fate of the Scott Act now before them on appeal, is, TO SAY THE LEAST OF IT, *rendered somewhat doubtful*" (116); "but I think an Act, which in effect *authorizes the inhabitants of each town or parish to regulate the sale of liquor and to direct for whom, for what purposes, and under what conditions spirituous liquors may be sold therein*, DEALS WITH MATTERS OF A MERELY LOCAL NATURE, *which*, by the terms of the *16th sub-section of sec. 92 of the British North America Act*, ARE WITHIN THE EXCLUSIVE CONTROL OF THE LOCAL LEGISLATURE" (171).

Another peculiarity of "a legal analyst" is, that under certain circumstances he will translate an easy English word into Italian, but when he uses Latin words in a novel manner he leaves the reader to do the best he can. For example, he tells us that traffic is "from the *Italian* "*tratta*," to trade," (151), but he frequently speaks of Parliament legislating "*bona fide*" (129, 137, 179, &c.), and yet leaves us to grope around for a new meaning to the words.

"A legal analyst," in his religious aspect, has some of the characteristics of a christian. He is no respecter of persons. He will not speak evil of dignitaries; he will treat of arguments and not of their authors (98). But,

nevertheless, if dignitaries insist upon provoking and teasing him he will call them a whited wall, or anything else that comes handy (37, 165, 168, 169, &c.).

Learning to be "a legal analyst" evidently incapacitates the devotee for every day life. Constant criticism produces a crabbed, carping impatience with the mediocrities, who obtruding their perverse stupidities upon finely adjusted sensitiveness, render a legal analyst's life a continuous struggle with his temper. He takes on a Carlylean coarseness and crossness, and editors and barristers, judges and privy councillors alike come under the lash of his correction. It is well, however, that society in this way gets rid of these philosophers—well for society, because it gets along less roughly; and well for the sages, for they can without distraction elucidate and disentangle with all necessary elaboration. No one in active practice could write 184 pages on two clauses of the B. N. A. Act and merely deal with the decisions upon them. Or if he did he would not have time to ruin the reputation of the judges as he ought to do it. In this busy world it is quite evident that there must be a further heterogeneity of occupation, and that no community will hereafter be complete without "a legal analyst." Jndges have been far too free from criticism, and the result is that "I ARRAIGN INCOMPETENCE FOR OFFICE AS ONE OF THE GREAT CRIMES OF THIS DAY IN PUBLIC PLACES" (183).

The Government should at once employ the services of Mr. Travis to analyse the judgments of all the judges in the Dominion, and should at once expel for incompetency all those he condemns as unworthy. The whole of the New Brunswick bench will go first and without further analysis. This is their measure; "As is to be expected with reference to a court, in connection with which Truth and Candor compel the admission, without doing them a particle of injustice, that, since Ritchie, C. J., left it, it has not contained, nor does it now contain, among its judges, a single lawyer possessing anything like thorough scientific knowledge;

its decisions, now still further to be examined, in this connection show anything else than sound legal knowledge; but in some respects, Truth compels the statement, are supremely ridiculous" (37). The Ontario judges are no better: "Considering that holding in the Ontario Court of Queen's Bench, and the equally absurd *semble* from another Ontario case we have named (*Regina* v. *Taylor*), ... we are almost forced to the conclusion that there are other Courts in the Dominion of not much higher authority than that extremely weak Court, the Supreme Court of New Brunswick" (125). The Thrasher case is enough to condemn the British Columbia judges. Out of the Supreme Court, the Chief Justice may remain, and Mr. Justice Gwynne, if he brushes up a little, but the others will surely be plucked. The Privy Council are by long odds the worst. They are "as utterly ignorant as children" (169). "Their ignorance (to be perfectly candid and strictly just); actual, stupid, stolid, ignorance of the matter they are examining, when we consider that *that* is our highest, authoritative appellate Court, is positively painful" (168); their judgment "on the validity of the Canada Temperance Act was even worse than the judgment which we had previously thought was the worst judgment we had ever examined (and we have critically analysed many thousands of judgments—over three thousand in one treatise alone, we once wrote)" (165). After this damaging *exposé* of crass stupidity what can be the use of continuing appeals to England? Why not merely mail copies of judgments complained of to St. John, N. B., for critical analysis? It should not cost very much more than the present system of appeals, and then the result being attained scientifically would be necessarily apparently correct to both sides, and all parties would thus be satisfied, if not pleased.

Three reasons for continuing the present practice occur to us. First, the oracle might die, and it would then be be better for us that we had never known anything better than the Privy Council. Second, legal analysis does not show that any of the decisions of the Privy Council are wrong. The judgments are illogical, ungrammatical, and

stolidly stupid, but the decision, someway or other, always turns out to be correct. Perhaps the Board may have similar luck in the future. While fortune stands to them we may safely remain. Third—we take a long breath—third, the critical analysis spends itself largely on sentences detached from their connection, on opinions imputed to, but not held by, the Privy Councillors. The Privy Council has laid down some rules which are useful in helping one to ascertain whether the statute is *intra* or *ultra vires*. One of these rules is that if the legislation does not fall within any of the classes of subjects assigned to the Legislatures, then the Legislatures have no jurisdiction and the matter falls within the competency of Parliament. This seems not only simple, but necessarily correct, and yet Mr. Travis with the most perverse ingenuity first misunderstands the rule and then spends page after page demolishing his misunderstanding. It is hard to see how so simple a statement could be misinterpreted. It would take "a legal analyst" to do it. But it is quite easy when you know how. This is the way:—The rule may be expressed in other language—"the new doctrine is thus established by the Privy Council, and by the fair and plain application of their tests, that Parliament can pass *the identical Act* that is held *ultra vires* of a Legislature" (144). It will be observed with what facility "a legal analyst," by merely restating a proposition, can show its absurdity. An Act may contain something *ultra vires* of Parliament, and something else *ultra vires* of the Legislatures, and yet the Privy Council are such fools that they never thought of that, but hold that if the Act cannot be passed by a Legislature it must necessarily be within the competence of Parliament. The Judicial Board may possibly believe that to be law, but they have never said so, and (now that Mr. Travis has put them on their guard) probably never will say so. In *Russell* v. *The Queen*, 7 *App. Ca. at p. 836*, the Judicial Board did say that "if the *Act* does not fall within any of the classes of subjects in section 92, no further question will remain, for it cannot be contended" that unless it falls within one of these classes Parliament had not full

legislative authority to pass it. In that case there was one point in controversy: Had Parliament power to pass a general temperance law ? and the Judicial Board says that it cannot be contended that if the Legislatures could not pass a temperance Act, Parliament must be able to do so. There must be jurisdiction over the temperance question somewhere—if not in the Legislature, then in Parliament. That is quite simple and quite true, and the Privy Council did not add to that proposition, a statement that every Act, however multifarious or peculiar, must be soley in one jurisdiction or the other; nor did they say that if the Legislature of Ontario could not pass an Act to have operation in Quebec; that therefore Parliament could pass that identical Act.

The pure gold is shewn by the analyst at page 60. He claims to have established several propositions. This is the first:—"That the Dominion Parliament and the Local Legislatures, have not, as has been claimed, concurrent powers, but that Parliament has the dominant, and the Local Legislatures, the subordinate power." This is about as far wrong as he could go. It is worse than wrong, for it shews that the true statement of the case had never occurred to the writer. He decides between concurrent power and a dominant and subordinate relationship. Neither is correct. We do not think that the existence of concurrent power has ever been suggested even by a Privy Councillor; and Mr. Justice Loranger, (whose letters upon the interpretation of the Federal Constitution, have been analysed into pure stupidity,) is much more nearly accurate than his critic, when he says:—"In the reciprocal sphere of their authority thus recognized, there exists no superiority in favor of Parliament over the Provinces, but, subject to Imperial sovereignty, these Provinces are quasi-sovereign within their respective spheres, and there is absolute equality between them." This statement is also defective, for there is not, and can be no equality, An orange may be divided equally, but it is impossible to separate legislative power into moieties. No common denominator can be applied. If "Insolvency"

counts as six, at how much should "Municipal Institutions" be rated?

But it is not necessary, nor do we think it possible, to express in any one word, the relative position of Parliament and the Legislative Assemblies. Of the total sum of legislative power, a portion was assigned to Parliament and a portion to the Provincial Legislatures, and the fact that in exercise of its powers, Parliament necessarily interferes with "Civil Rights," does not make its power in any sense dominant, it only shews that under a heading of jurisdiction—Insolvency for instance—a portion of the civil rights of men are included. There is no difficulty in agreeing upon a set of words to express this meaning, and we are quite willing to adopt those used by Chief Justice Ritchie in *The Citizens' Insurance Co.* v. *Parsons*, *4 Sup. Ct. R.*, *215*, and quoted by Mr. Travis as containing a true exposition of the matter:—"No one can dispute the general power of Parliament to legislate as to trade and commerce, and that when, over matters which Local Legislatures have power to deal, local legislation conflicts with an Act passed by the Dominion Parliament, *in the exercise of any of the general powers confided to it*, the legislation of the local must yield to the supremacy of the Dominion Parliament; in other words, that the Provincial legislation, in such a case, must be subject to such regulations, for instance, as to trade and commerce of a commercial character, as the Dominion Parliament may prescribe. I adhere to what I said in *Valin* v. *Langlois*, *3 Sup. Ct. R. 15*, that the property and civil rights referred to, were not all property and civil rights, but that the terms property and civil rights must necessarily be read in a restricted and limited sense, because many matters involving property and civil rights are expressly reserved to the Dominion Parliament, and that the power of the Local Legislatures was to be subject to the general and special legislative power of the Dominion Parliament, and to what I there added. But while the legislative rights of the Local Legislatures are, *in this sense*, subordinate to the rights of the Dominion Parliament, I think such right must be exercised, so far as may be

consistently, with the rights of the Local Legislatures; and therefore, the Dominion Parliament would only have the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually, in relation to matters confided to the Parliament of Canada." We have taken the liberty of using italics, for the purpose of drawing attention to the wide difference in statement between the learned Chief Justice and Mr. Travis. When the latter says that the Local Legislatures have the subordinate power, let him add "in the sense explained by Chief Justice Ritchie in *Valin* v. *Langlois*," and he will be right. If he stop short of these words, he will be, as he now is, utterly wrong.

WE have also received a "Manual of the Acts respecting Marriage Licenses and the Solemnization of Marriage." The control of the marriage license branch of the public service being about to pass from the Treasury Department to the Department of Agriculture, Mr. Acton Burrows commences his duties by arranging the numerous statutes so that their effect may be readily understood. If some one would kindly take the statutes of last session alone and consolidate the original acts and their amendments which may be found in that single volume, he would be a benefactor to the profession. Every one is presumed to know the law, but if when trying to find it out, he misses a second amendment to a statute of the same session, he really ought to be excused.

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PARAPHERNALIA.

IS it necessary to trick out judges in extraordinary costume, to surround them with numerous and deferential officials, and to accompany their movements, into and out of court, with jabbered proclamations, in order that the vulgar crowd may be properly impressed with their dignity and filled with due respect for the administration of justice? Such questions are not only being raised and discussed in England and the United States, but the oft predicted subversion of the realm has again been promised, if any change be permitted—promised for England if ceremony be dispensed with, and for the United States if it be introduced.

To Canadians, whose judges occupy an intermediate position, having perhaps enough, but not too much, ceremony, the discussions appear ludicrous in the extreme.

In England there has been far too much of stately ostentation. The judges share with the bishops the homage paid to those who are felt to have peculiar relations with the other world. Each judge is provided with a marshal—a kind of a master of ceremonies whose business it is to arrange the processions, to enforce observance of the traditional solemnity, and to excite and foster feelings of awe

and reverence. He is also charged with the duty of cheering the drooping judicial spirits, after a few hours of court work have worn them out. Until recently, two clerks were well paid for standing between each judge and familiarity. These three officials formed the judge's constant body-guard, on circuit as well as at home. In the outer towns where education had not sufficiently deified the judges, the sheriff, with his cocked hat and sword, and his gorgeously attired officers, escorted his lordship from station to hotel, hotel to church or court, and back again, and wherever else duty or custom might call him. The opening of the court had to be preceded by attendance at church, and the commencement of business by the repetition of various proclamations, rushed over by men whose principal endeavour seemed to be to lower the record, both in minutes and inspirations. There were the ancient "O yez! O yez! O yez!": then the judge's commission was read, and afterwards, at some length, the heralds denounced vice and immorality—why these, instead of mice and mosquitoes, history alone can tell.

In the United States, the extremity of republican plainness has been in vogue. With the exception of the Supreme Court at Washington, the judges appeared on the bench as on the street—minus, of course, their hats. They have had no distinguishing dress.

But what momentous changes have taken place! A radical parliament in England has recently had the hardihood to curtail the train of each judge by one of the clerks, and to dispense with the reading of the proclamations as useless waste of time. It had been argued that English judges could be dignified apart from the trappings of office, but their first attempt was a dismal failure, and it at once became apparent how completely dependent they were, for their dignity, upon the extra clerk and the proclamations. Robbed bees could not have made more fuss, and nothing could have been more ridiculous than Mr. Justice Manisty's whine to the grand jury at Newcastle. We are indebted to

The Law Journal, (Eng.,) for an account of the proceedings:—

"At the Guildhall, the learned judge having taken his seat on the bench, the Clerk of Assize (Mr. Edward Bromley), in lieu of reading the commission and the proclamation against vice and immorality, simply said: 'I produce in Court the Commission of Assize, Nisi Prius, Association, Oyer and Terminer, and general gaol delivery for the county and city of Newcastle; and the Hon. Sir Henry Manisty, Knt., one of the judges of the High Court of Justice, and others of his fellows, are appointed, under this commission, to hold this assize.'

The learned judge asked what was to be done next.

The Clerk suggested that it was for his lordship to direct what should be done. That was all he (the clerk) had to do.

The learned judge was understood to say that he did not know whether such a duty did devolve upon him. He had not the slightest notion of his duty at that moment. He thought the best thing to do was to ask the sheriff to return the precepts.

The grand jury was then sworn.

The Clerk having called the jury and sworn them,

His lordship said: You don't think it necessary to go through the form of counting them?

The Clerk: There is no one to count them. My duty is simply to call them, and there is now no person to count them.

The learned judge, in charging the grand jury, said that we lived in a time of change. So far as he could judge there was scarcely anything that was what it ought to be in the opinion of those whose duty it was to regulate the affairs of this country. They had witnessed that day the abandonment of certain forms. He was addressing them,

the grand inquest—nineteen of them. Probably many of them might think that was a small matter, there being nineteen instead of twenty-three; but if they began to take the limbs off the body, there were plenty of people ready to take the body to pieces also. Depend upon it, if they wished to maintain the grand jury as one of the institutions of the country, they must show their readiness and willingness to maintain it in its entirety. Dislocation was very often the commencement of death. It was not often that any very serious duty had to be performed by them; but if they let that institution go and a time came when it would have been a most influential factor in the country, those who lived to see it would be very sorry. That was the case with many other things. Once undone, they could not go back and recall them. Depend upon it, they should think well before they gave up any institution. Referring particularly to the changes made in the arrangement of the assizes, he said the clerk of the assize and his fellows were now called upon to perform duties which the grand jury never saw performed by them before.

This was one of the results of persons controlling and regulating matters they had not been accustomed to. The judges had been parties to it because they could not help themselves. But the clerk of the assize complained, and he was sorry to say he was not the only person perhaps who had a right to complain. Certain regulations which were thought desirable could only be got by cutting off and taking away other officers. The judge was to have one clerk instead of two. If his clerk was ill—as often was the case, and he had one very ill at that moment—he must find another out of his own pocket. But he was only to have one clerk; and as they went on with those changes, so would the Treasury get a little money into their purse. Attempts were made to do away with the marshals; and he would just like to ask the grand jury, Would any of them like to be sent to hard labor—and it was hard labor—for hours and hours every day, and then go into a solitary room

and not have a human being to speak to? He called it—he would not say what. Those attempts they succeeded in resisting, and they were allowed to have a companion."

Every one will be delighted, we are sure, to know that for a time Mr. Justice Manisty is to have a companion. Companions are necessities. Fancy disrobing and putting on your street coat in "a solitary room!" It is enough to turn us away from the profession.

On the other hand, the democratic sentiments of the good people of the United States have been severely shocked by the assumption of gowns by the judges of the New York Court of Appeals. Wrath and disruption have been denounced against the impious innovators, and sarcasm and wit have been exhausted, but with no effect. The judges wear their gowns, and the sun, nevertheless, still smiles, and the world does not cease to turn gently round.

We give specimens from each side of the controversy. "Homespun," in *The Central Law Journal*, wrote as follows:—

"The American idea, is that the respect paid to public functionaries should not be due to a livery or uniform. On whom is the gown to have this awe-inspiring effect? On Wm. M. Evarts perhaps, or Charles O'Connor, or George F. Edmunds. How absurd. Possibly the sight seekers at the Capital, coming unexpectedly into the little room where these judges preside, find the gowns quite a "raree" show, which inspires their curiosity to learn from their *ciceroni* or the obliging ushers, the names of the justices, but no lawyer who keeps in mind the real principles of American citizenship, but regrets to find anywhere in his country a court deriving respect from a uniform. If the livery is necessary for the information of the ignorant, then why not put all other officials in livery. The livery ought not to be necessary for the information of the judges themselves; they are to be judges in gowns or out. The American idea is to badge the servitors, the men who would not be known as such without the badge. We put postmen in uniform, but

not the Postmaster General; we uniform the brakemen, but not the railroad presidents. If we are to have gowns, we should gown the constables or the attorneys, and let the judges be known, as kings and ambassadors, by the simplicity of their attire as gentlemen, without livery or uniform."

As against this attack we would like to set a portion of Mr. David Dudley Field's address to the New York Court of Appeals :—

"A badge of office has been worn by judges the world over. A custom so general must have a foundation in reason. It is possible, no doubt, for a rude sort of justice to be dispensed without ceremony or sign of office. We can imagine judges at one end of a table and lawyers at another, all sitting and covered, debating cases across the table, while a promiscuous crowd of visitors surges through the room, and it might happen for a while that the guilty would be punished, the innocent released, and the spoiler deprived of his spoil; but we think the scene must end in general confusion and contempt. The simplest rule of ceremony requires judges, counsel, and audiences to be uncovered; the judges to sit apart on raised seats, and the counsel to stand while addressing the court or examining witnesses. To this has been lately added, that the court and the bar exchange salutations as the judges take their places. Should there be any more ? The answer depends upon a consideration of what would be the most becoming in the dress, language, and demeanor of those who participate in the administration of justice. We think that some insignia of office would befit the high judicial functions which you exercise, and that none can be found so appropriate as the robe, so unostentatious and conformable to the usage of our forefathers. The robe has been worn by judges from time immemorial * * * The judges of the Supreme Court of the United States have never entered the chamber where their august functions are performed, without wearing their robes of office. Marshall, Story and Nelson wore them. The garb is no more a badge of monarchical than of

republican office. Indeed, insignia of office more befits a republican than a monarchical country, for while in the latter they represent the majesty of the throne, in the former they represent the majesty of the people. These insignias tend to inspire respect, and to gratify sentiment, and it is sentiment after all, which sways the world. * * * If our highest court of justice is ever to have any insignia of office, there can be, as I have said, none better than the robe; none simpler or more graceful and convenient. It is the easiest to put on and the easiest to lay aside; it requires no other change of dress; it is simpler than the uniform which the officers of the army and navy wear; simpler than the costume which society exacts on many occasions."

BURNING AND BURYING.

RELIGION and morality or, at all events, a vague sentimentalism that supports itself by no better argument than that, "It does not seem right," appears to get mixed up with almost every question. A dread of doing anything in a new way rules the vast majority and would impose absolute uniformity upon all were it not for those lawless iconoclasts who insist upon making trouble with their perverse individuality. If they will not be led by the example of their forefathers, if they dare to introduce change in time honored custom, then they must be coerced by the law and their ideas stretched or contracted until they reach the general standard. At least so argued the prosecutor in *Queen* v. *Price, L. R. 12 Q. B. D. 247.* The prisoner instead of placing the body of his dead child in the ground, where after undergoing all stages of putrefaction it would finally lose all identity and return to native dust, adopted the method of disposition known as cremation—by burning, he

anticipated the inevitable result a score of years and saved the body from worms and abomination. For this he was indicted. "It did not seem right to dispose of a body in such a manner. It should have been decently buried."

Surely the question is one of expediency and not of morality or religion. If burial secured resurrection and burning ruined the deceased's expectations then it would be cowardly and unpardonable to injure a dead, and therefore helpless, individual. But this apart, and no one worth arguing with will urge the disturbance of resurrection, what has right or wrong to do with cremation? None of the commandments affect the question, nor do we think that there is any Scriptural injunction upon the point. It is then a question of expediency—of risking the poisoning of the living by the dead or of losing the evidence of the poisoning of the dead by the living.

In the case referred to Mr. Justice Stephen stated the law to be as shown in the following extracts from his charge:—

"After full consideration I am of opinion that a person who burns, instead of burying, a dead body, does not commit a criminal act, unless he does it in such a manner as to amount to a public nuisance at common law. There are some instances, no doubt, in which courts of justice have declared acts to be misdemeanours which had never previously been decided to be so, but I think it will be found that in every such case the act involved great public mischief or moral scandal. It is not my place to offer any opinion on the comparative merits of burning and burying corpses, but before I could hold that it must be a misdemeanor to burn a dead body, I must be satisfied that not only that some people, or even that many people, object to the practice, but that it is, on plain, undeniable grounds, highly mischievous or grossly scandalous. Even then I should pause long before I held it to be a misdemeanor, for many acts involving the grossest indecency and grave public mischief—incest, for instance, and, where there is no

conspiracy, seduction or adultery—are not misdemeanours, but I cannot take even the first step. * * * * There are, no doubt, religious convictions and feelings connected with the subject which everyone would wish to treat with respect and tenderness, and I suppose there is no doubt that as a matter of historical fact the disuse of burning bodies was due to the force of those sentiments. I do not think, however, that it can be said that every practice which startles and jars upon the religious sentiments of the majority of the population is for that reason a misdemeanor at common law. The statement of such a proposition, in plain words, is a refutation of it, but nothing short of this will support the conclusion that to burn a dead body must be a misdemeanor. As for the public interest in the matter, burning, on the one hand, effectually prevents the bodies of the dead from poisoning the living. On the other hand, it might, no doubt, destroy the evidence of crime. These, however, are matters for the Legislature and not for me. * * * * Though I think that to burn a dead body decently and inoffensively is not criminal, it is obvious that if it is done in such a manner as to be offensive to others it is a nuisance of an aggravated kind. A common nuisance is an act which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects."

CONVEYANCERS.

IN the interests of the community we protest against granting permission to practise as a conveyancer to every one who can scrawl with a blunt pen. So long as ignorance is legally labelled knowledge, so long will the public be deluded and despoiled. A government has no more right to call a man, who knows nothing of conveyancing, a conveyancer, than a merchant has to put up packages of sand and call them sugar. In both cases the public is deceived and wronged.

From a professional point of view solicitors in the country suffer by the competition of men who, having nothing to sell but their penmanship, charge many times its value in filling up blanks at a dollar or two apiece. But, on the other hand, they frequently secure a heavy bill of costs out of litigation induced by the penman's ignorance, which goes a long way to compensate them for loss of conveyancing.

A striking example is at hand. A. agrees to give B., as security for C.'s debt, a mortgage upon Blackacre, and to assign two other mortgages, upon other properties of which he is mortgagee. A penman is employed to "do the writings," and, having perhaps heard that by the Statute of Uses two or three conveyances can be worked into one deed, he pulls out a form of assignment of mortgage, and having, with the help of the printed words and the length of the spacings, made fair guesses at what he should do, takes advantage of a remaining clean spot to insert the following: "and that, for the better security of the said mortgagee, the mortgagor also mortgages to the mortgagee two mortgages, as follows, viz.: one mortgage made by W. to B., the mortgagor of this mortgage, which said mortgage bears date, &c., and was registered, &c., which said mortgage is for the sum of, &c. And another mortgage, made

by W. to the aforesaid mortgagor, which said mortgage bears date, &c., and was registered, &c., and for the sum of, &c. Both of the aforesaid mortgages become due and payable eight months from the date from which they were executed."

The mortgagee very likely paid $1.50 for this precious production, and will probably pay $200 before he gets it put right; if, indeed, by some technicality he is not, in the end, defeated, and has to lose his security and pay the lawyers on both sides of the litigation.

The Government may reply that the client selected his own conveyancer, and must pay the penalty of a wrong or bad selection. But the Government labelled the man "conveyancer," and the client acted upon the faith of the label. Governments undertake to license steamboats to carry passengers, and to see that the boats are reasonably safe for the purpose. The public depends upon the license for safety, and the responsibility of its issue cannot be got rid of by telling a blown-up individual (or his widow) that he need not have gone on the steamer unless he liked.

The Government may also say that a license issues only after examination of the candidate. If that be so, how do mere penmen obtain their licenses? Such an answer would be very unsatisfactory to a blown-up party, and why should it be any more satisfactory to the mortgagee we have been telling about? Both would question the character of the examination, and everyone would agree with him that it must have been a farce.

JUDGES' SALARIES.

HAVING now secured an additional judge, the bar should not rest satisfied until adequate salaries are provided for occupants of the bench. There is no reason why Manitoba judges should receive salaries smaller than those given to the judges of Ontario and Quebec. In Ontario the salaries are nominally the same as in Manitoba, but while the circuit allowance there is $100 for each town, the judges here are allowed $5 a day and railway fare. Out of the Ontario allowance the judges can easily add $1,000 or $1,200 to their incomes, while the Manitoba pittance is not sufficient to cover actual expenditures. Quebec judges are still more fortunate than their Ontario brethren. The judicial salaries there are as follows:—

Chief Justice	$6,000
Eleven Puisne Judges, each	5,000
Thirteen Puisne Judges, each . . .	4,000
Two Puisne Judges, each	3,500

Three things are to be considered in adjusting salaries: First, cost of living, for judges should be able to maintain in society the dignity of their position; second, ability and standing of the men; and, third, the character and importance of the work to be done. Tested by any of these standards, Manitoba judges are entitled to equal pay with any other judges of equal rank. Living is more expensive here than in the older Provinces. Our judges are Ontario men, and are therefore of the highest attainable ability. If they had happened to have practised in Manitoba we would not, of course, expect that they would get more than half pay—they would not be fit for the position. And as to the work to be done, it is of the same class as that disposed of in the other Provinces, with this additional responsibility that having no Court of Appeal the judges

should exercise the most careful and scrupulous vigilance in order that the expense of Supreme Court appeals should not be of frequent occurrence.

Comparison with the salaries given in other colonies shows that our judges are paid less than judges in any other part of Her Majesty's dominions. The following table is said to be correct:—

Victoria	906,225	$17,500	$15,000
N. S. Wales	840,614	13,000	10,000
Queensland	248,255	12,500	10,000
S. Australia	303,195	10,000	8,500
New Zealand	517,707	8,500	7,500
Tasmania	122,479	7,500	6,000
Cape Colony . . .	1,249,824	10,000	8,750
Natal	400,676	7,500	6,000
Jamaica	580,804	12,500	not given.
British Guiana . . .	257,473	12,500	7,500
Hong Kong	1,094,804	12,500	8,500
Straits Settlements . .	350,000	12,000	8,400
Ceylon	2,758,529	11,250	9,000
Windward Islands . .	285,000	10,000	not given.
Fiji	12,500	10,000	do.
Trinidad	153,128	9,000	6,000
Leeward Islands . . .	118,000	7,500	6,000

SPECIAL EXAMINERS' FEES.

WHATEVER doubt there may be as to the constitutionality of the statute relating to law stamps, there can be no question that twenty-five per cent. of the fees paid to Special Examiners is imposed illegally. Their fees are as follows:—

For appointment	$1 00
" original depositions, per folio . .	0 20
" copy	0 10
" oath	0 20

Of these fees the Examiner retains seventy-five per cent. and disburses the rest in the purchase of law stamps, which he affixes to the original depositions.

By section 92 of the B. N. A. Act, Provincial Legislatures are empowered to raise revenue by direct taxation. They have no power to raise money by indirect taxation. The money paid for the stamps just referred to goes to the Provincial Government and forms a part of the general revenue of the Province, and is not applied to any particular object. It is not a fee of office. It cannot be said that out of such receipts the Government has to pay the Examiners. It is a mere tax. Is it, then, a direct or an indirect tax? If the former it may be very unjust, but not illegal; if the latter, there is no reason why its payment should be continued.

The case of *Reed* v. *Mousseau*, *8 Sup. C. R. 408*, seems to be conclusive upon this point. The Quebec Legislature, by the Act 29 Vic., c. 8, for the first time imposed a tax of ten cents on the fyling of every exhibit in a cause. The tax was payable by means of stamps and was to form part of the consolidated revenue of the province. This act was repealed by 43 and 44 Vic., c. 9, and the same tax was reimposed and other provision made for its payment into the consolidated revenue. On appeal to the Supreme Court,

four judges held that the Act was *ultra vires*. The other two judges held that it was valid, but their judgments rest upon grounds which could not be urged in favor of the Manitoba tax. All the judges agreed that the tax was indirect.

The profession are extremely patriotic, and the Provincial Government is no doubt in need of all the money they can secure, but the profession have a greater regard for justice for their clients, and must in their interest refuse to disburse their money illegally.

BRIEFS FOR TWO COUNSEL.

MR. Justice Pearson is reported, in *The Law Journal* (Eng.) *for 31st May, p. 345,* to have used the following language in the case of *Llanover* v. *Homfray:* "I beg to state most distinctly, I regret very much that there seems to be a disposition at the present time to cut down the costs of two counsel. I have heard it stated by other judges—and I entirely agree with it—that if this is to be done, I neither know how the leading counsel are to do their business properly, nor do I know how the junior counsel (and I say so with all respect to them) are to learn their business. As far as I am concerned, except in cases where really no leading counsel ought under any circumstances be retained, I am certainly not disposed to cut down two briefs on taxation."

NEW ORDERS.

THE following new orders have been promulgated:—

1. General orders of this court on its equity side 179, 180, 405, 406, and general order 38 of the 17th of February are hereby repealed.

2. General order of the Court in its equity side 248 is hereby amended by striking out the words "to the presiding Judge in Chambers on any day that he may set in Chambers," also the word "decree" wherever the same occurs; and also the words "and the presiding judge may then hear, or adjourn into court or otherwise dispose of such matters on such terms as he thinks proper."

3. Terms for the hearing of cases, including examination of witnesses, are to be held five times a year, on such days as the Court may from time to time appoint.

4. A judge will sit in court every Wednesday, except during vacation, for the purpose of disposing of the following business in equity—injunctions, motions for decree, hearings pro confesso on bill and answer on further directions, petitions, demurrers and appeals from any order, report, ruling or other determination of the Master.

5. Appeals from the referee in chambers and such chamber applications in equity as cannot be disposed of by the referee, may be brought on for hearing upon any day before the judge presiding in chambers.

Dated 26th August, 1884.

(Signed,) LEWIS WALLBRIDGE, C. J.
J. DUBUC, J.
T. W. TAYLOR, J.
R. SMITH, J.

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SIR EDWARD FRY, L.J., ON PUNISHMENT.

IN early times priests were judges, and inasmuch as they believed themselves to be the depositaries of God's law, it appeared to them proper to use man's power to its enforcement. This notion, abandoned by civilization for ages, has found an advocate for the investment of judges with authority to punish sin, as sin against God, and not according to its evil effects upon man.

Man's punishment of a criminal has been understood to be based upon the necessity for the establishment of a regard for laws which prohibit, under various penalties, acts which the community believes to result in evil to itself—offences against "the peace of Our Sovereign Lady the Queen, her crown and dignity." Sir Edward Fry, however, would amend the indictments and substitute "Lord God Almighty" for "Our Sovereign Lady the Queen," and "His Holy Law" for the statutes.*

But let the learned judge state his own position. He asks: "Why do we strive against sin?" and answers the question by pointing to "the fact that there is a fitness of suffering to sin, that the two things, injustice and pain, which

* Essay on "Inequality of Punishment," *Fortnightly Review.*

are both contrary to our nature (!) ought to go together, and that, in consequence, we naturally desire to bring about an association of the two where it does not already exist. Whence do we derive this principle? Not from the outer world; for, as we have seen, the world responds to it only imperfectly, and by reason of the very imperfection drives us to efforts to realize by punishment that association which otherwise would not exist in fact. *Punishment, in short, is an effort of man to find a more exact relation between sin and suffering than the world affords us.* . . . In a word, then, it seems to me that men have a sense of the fitness of suffering to sin, of a fitness both in the gross and in proportion; that so far as the world is arranged to realize in fact this fitness in thought, it is right; and that so far as it fails of such arrangement, it is wrong, except so far as it is a place of trial or probation; and, consequently, that a duty is laid upon us to make this relationship of sin to suffering as real, and as actual, and as exact in proportion as it is possible to be made. This is the moral root of the whole doctrine of punishment. If this be the true view, some things become clear to us. First, we see that in the apportionment of penalties, we have to regard primarily and directly the moral nature of the crime, and to assign pain and suffering as nearly as we can to the enormity of the sin. . . . On the theory I present, the evil consequences of an act are important so far, and so far only, as they were known, or ought to have been known, to the actor, and so ought to have acted on his conscience, and are an element in the magnitude of his sin. It follows again, from what I have said, that reformation, repression, example, however important they may be in themselves, are only secondary and collateral to the main idea of punishment; and I stand in hopeless antagonism to those philanthropic minds who seek to make our punishments solely reformatory, and to eliminate from our penal institutions every trace of moral reprobation."

The learned judge has the courage of his opinions and follows them to their logical conclusion: "The gun has been loaded, the victim has been tracked, the watch has

been kept through long hours of patient wickedness, the gun has been aimed and discharged, but the victim has escaped; on the primary principle of punishment, that man appears to me to be worthy to be punished as a murderer."

And, in awarding sentence, he could not avoid acting upon his opinions: "Punishment is a part of justice if it is anything of moral worth; and I cannot bring myself to think of justice without regard to right and wrong, without regard to the utterances of the human conscience, without a thought behind all of an infinite and perfect judge."

When inflicting punishment, then, we should primarily regard the offence, as God would regard it, as an offence against Him, attend, in the first place, to "moral reprobation"; and with this view we must listen "to the utterances of the human conscience."

Now let us assume that "the human conscience" is a divine preceptor, and let us ask of the oracle its directions. If it happen to have drank deeply of the wells of christian charity, we will hear the familiar words: "Judge not, that ye be not judged;" "He that is without sin among you, let him first cast a stone at her;" "Go and sin no more;" "The Lord willeth not the death of a sinner, but rather that he should turn from his wickedness and live." "A fitness of suffering to sin"! No: "The blood of Christ cleanseth from all sin;" "Though your sins be as scarlet they shall be as white as snow." "Men have a sense of the fitness of suffering to"—unrepented and unforgiven—"sin." Ah yes! but what ermined judge can divine the intents of the heart, and apply his chemistry to contrition. A child sins, and its father is a brute if he strikes while sorrow and repentance are heaving the breast with sobs and cries. A man sins, and if, further than protecting society, a judge administers chastisement, he not only arrogates to himself the functions of God's avenging angel, who is perfectly competent, we believe, to perform his duties unaïded, but he assumes that he is doing God service and vindicating His law, when God

has already told him "thy ways are not my ways, nor thy thoughts my thoughts."

"Moral reprobation!" What are God's ways, so far as he has revealed them to us in this regard? The wicked prosper and the good suffer in this world, although there is to be a reversal in the world to come. Why endeavor to disarrange this order, and anticipate the punishment of evil-doers, which is sure to be inflicted. If there were any doubt about sin meeting its just rewards eventually, Sir Edward Fry might be justified in attending to the matter now, but we do not suppose it takes that ground.

If we had been told that christians recognize "the fitness of suffering to *righteousness*," we would have assented; but, if he argued from this fact that our judges should see to its practical application in life, we should not feel inclined to grant his conclusion. And so, when he tells us that there is a sense of the fitness of suffering to sin, we reply that this may also be true, but our business, from a christian standpoint, is to save the sinner, and not to send him as quickly as possible to his final account.

Blasphemy and idolatry may be practised with impunity until the life-blood, losing the beat of vigorous manhood, insensibly slackens and rests from the weary work of a long life. Shall we stop it sooner? Are we, as the soldiers of Israel, to insist upon the worship of the Lord Jehovah, and exterminate all the Canaanites who worship false gods? And if we allow the Canaanites immunity from idolatry, why award "moral reprobation" in the case of the Thugs?

"The gun has been loaded, the victim has been tracked, the watch has been kept through long hours of patient wickedness, the gun has been aimed and discharged, but the victim has escaped"—and the would-be murderer has repented in dust and ashes, been forgiven by God, and taken to the bosom of his intended victim. "On the primary principle of punishment"—moral reprobation—"that man appears to" us to be entitled to acquittal, and it would be a

very old testament course that he should "be punished as a murderer." We go further and contend that, had the murder been accomplished, acquittal must, from a merely moral standpoint, follow contrition; and that as contrition is an illusive state of mind or heart, frequently deceiving the subject himself, and wholly outside the possibility of judicial investigation, its absence or presence can in no case be certainly predicated, even when the lips continue to glory in the crime of the hands, or the flesh to waste away in tears. Consider for one moment the public consternation that would attend upon a decision of the judges of the Court of Probate and Divorce to the effect that "he who looketh upon a woman to lust after her, hath committed adultery with her in his heart," and that such an one should be treated and branded as an adulterer. Harem concealment of beauty would become a necessity, or politeness and gallantry would have to be abandoned, if one would save himself from malicious charges.

Bentham and Beccaria agree that crimes are punishable not for their immorality, but because of their effect upon society, and our jurisprudence adopts the principle, and punishes those acts only that are injurious to society. Mr. Justice Fry argues "that a duty is laid upon us to make this relationship of sin to suffering as real and as actual and as exact in proportion as it is possible to be made," and upon this principle legislators and judges must become penance-prescribers, and award the heaviest punishments for breaches of the positive commandments, among which are: "Honor thy father and thy mother," "Thou shalt not covet," "Thou shalt have no other gods before me," "Thou shalt not take the name of the Lord thy God in vain," "Remember the Sabbath to keep it holy," and the requirement of the New Testament, "Love one another." When a sin has been found, Mr. Justice Fry will permit consideration for society to weigh in the awarding of punishment, but only as a secondary and subsidiary consideration. If, therefore, there could be a wrong to society without sin, there would be no punishable crime. It would be *damno sine injuria*. But sin

without damage to society—*injuria sine damno*—would be punished.

Let us now examine a few of the arguments of the learned judge, and some of his criticisms of Bentham.

1. In combatting the theory that crimes are only to be measured by the injury done to society, he puts the case of an attempted crime, which, had it not miscarried, would have shocked the sensibilities of the whole nation. Some years elapse and circumstances being changed, the necessity for an example to society has passed. The learned judge thinks that under such circumstances the punishment awarded should be according to the great evils which the culprit entertained, otherwise, "a great wickedness, which resulted in no harm to society, would go absolutely unpunished." We would like to have a more specific statement of the supposed facts before giving an opinion, but if it be absolutely true that no harm has been done to society, and that there is no possibility of any necessity for the exercise of preventive justice, either as regards the man or the community, we cannot understand what society has to do with the case any more than if the offender had coveted my horse but refrained from stealing him—in each case "a wickedness, which resulted in no harm to society, would go absolutely unpunished."

2. "If the prevention of future offences is the sole ground of punishment, why are punishments to be apportioned according to the malignity of the offences"? "Our sole concern is the balancing of future evils to be prevented, against the future evil to be produced by the punishment." The answer is simple, and we are surprised that Mr. Justice Fry should have missed it. Punishment must protect society; and the least punishment which will have this effect is the proper measure for each offence. It is plain that a week's imprisonment would not protect society from murder, and that hanging is unnecessary to protect against petty larceny. The measure is not marked off into inches, but the experience of centuries has brought about an approxi-

mate accuracy upon these points. But is Mr. Justice Fry's rule more simple? Adjust suffering to the enormity of the sin! Let somebody catalogue the sins in order of their enormity, and let us behold it. Will blasphemy or murder head the list? Will a son's petulant answer to his father, or treason to a tyrant take precedence? And when this is settled and society's protection requires a heavier punishment than the schedule exhibits, a heavier may, it is said, be properly inflicted, for the highly satisfactory and scientific reason, that "*the culprit has no merits which he can oppose to his thus being made useful for the good of society.*" In this scheme therefore, the possibility of fixing punishment by reference to the wrong to society is admitted, and the only question left therefore, is whether in case the sin-schedule should show heavier punishment, it should be inflicted.

3. "On the theory I present, the evil consequences of an act are important so far, and so far only, as they were known, or ought to have been known, to the actor, and so ought to have acted on his conscience, and are an element in the magnitude of his sins." Among the heads of enquiry into this matter is:—"The moral responsibility of the actor; by which I mean not merely the question whether he be sane or insane, but what is the nature of his moral training, his ethical environment, his knowledge of right and wrong; what is the light against which he is sinning—for surely it is true now as of old, that "He that knoweth his master's will, and doeth it not, shall be beaten with many stripes, but he that knoweth it not, with few." All this is very well in theory, but in practice it would acquit the thugs, or at all events, reduce their hanging to a few stripes. "If *his* conscience" is not up to the "*human* conscience," then he must submit to the consequences and become an example for the humanizing of other consciences, and we should think that he had very few "merits which he could oppose to his thus being made useful for the good of society."

"If the utility of the punishment is the only object, the punishment of an innocent victim is as satisfactory, if the

error is undiscovered, as the punishment of the guilty .... In fact, according to this theory, the association of the punishment and the crime in the same person is absolutely immaterial for the purposes of justice." This is unworthy of the writer's logical power. In awarding moral reprobation, would there not be as much satisfaction in punishing the innocent as the guilty if the mistake were undiscovered? According to the utilitarian theory, for the purpose of prevention, it is clearly necessary that the guilty should be punished, and that punishment of the innocent should be, as far as possible, unknown. But the defender of moral reprobation administered by men must be well aware that sin can never be adequately punished or atoned for by the sinner himself, and that it is in the christian scheme of punishment, not in Mr. Bentham's, that vicarious suffering has a place.

The result seems to be, that notwithstanding the learned judge's criticisms he admits the adjustability of punishment to the injury to society and the prevention of crime; that man is incapable of awarding punishment for sin apart from its effects upon society; and that even if man were able to punish sin as sin, judges have no commissions from God, but only from the government, and the latter no mandate but from society. The inquisition would be the result of any other theory.

CODIFICATION.

JEREMY BENTHAM'S tirade against the common law, as judge-made law, is interesting and suggestive at a time when codification is the subject of so many brochures and essays. We give below an extract from the fourth of the famous letters to the citizens of the United States.

"To be known an object must have *existence*. But *not* to have existence—to be a mere nonentity—in this case, my friends, is a portion—nay, by far the largest portion of that which is passed upon you for *law*. I speak of *Common Law*, as the phrase is; of the whole of Common Law. When men say to you the *Common Law does this*—the *Common Law does that*—for whatsoever there is of reality, look not beyond the two *words* that are thus employed. In these words you have a name, pretended to be the name of a really existing object: look for any such existing object—look for it till doomsday—no such object will you find.

Great is Diana of the Ephesians! cried the priests of the Ephesian Temple, by whom Diana was passed upon the people as the name of a really existing goddess. Diana a goddess, and of that goddess the statute, if not the very person, at any rate the express image.

Great is Minerva of the Athenians! cried at that same time—you need not doubt of it—the priests of the Temple of Minerva at Athens: that Athens at which St. Paul made known, for the first time, the unknown God. The priests of Athens had their goddess of wisdom: it was this *Minerva*. The lawyers of the English school have her twin sister, their Goddess of Reason. *The Law* (meaning the *Common Law*.) "*The Law*" (says one of her chief priests, Blackstone), "is the perfection of reason."

* * * * *

Would you wish to know what a law—a real law—is? Open the statute book—in every statute you have a real

law; behold in that the really existing object, the genuine object, of which the counterfeit, and pretented counterpart, is endeavoured to be put off upon you by a lawyer, as often as in any discourse of his the word *Common Law* is to be found.

Common Law the name of an existing object? Oh, mischievous delusion—Oh impudent imposture! Behold, my friends, how, by a single letter of the alphabet, you may detect it. The next time you hear a lawyer trumpeting forth his *Common Law* call upon him to produce *a Common Law;* defy him to produce so much as any one really existing object, of which he will have the effrontery to say that that compound word of his is the name. Let him look for it till doomsday—no such object will he find.

Of *an individual, no; but of an aggregate, yes.* Will that be his answer? Possibly; for none more plausible will he find anywhere. Plausible the first moment, what becomes of it the next? An aggregate? Of what can it be but of individuals? An individual Common Law—no such thing, you have acknowledged, is to be found. Then where is the matter of which your aggregate is composed? No: as soon will he find *a body of men* without *a man* in it, or a *wood* without a *tree* in it, as a thing which, without *having a Common Law in it,* can with truth be styled *the Common* Law.

Unfortunately, my friends, unfortunately for us and you —in the very language which we all speak, there is a peculiarity, in a peculiar degree favorable to this imposture. Not in any Existing European language but ours, is the same word in use to be employed to denote the real and the fictitious entity; not in the ancient Latin, nor in any of the modern languages derived from it; not in the ancient German, nor in any of the modern languages derived from it.

Behold here the source of the deception. But in the mind of any man, by whom this warning has been received, no deception will it produce, unless in this instance impos-

ture be more acceptable to him than truth. In the article *a*—in the single letter *a*—he has an Ithuriel's spear; by the touch of it he may as often as he pleases, lay bare the imposture. *A Statute Law*, yes; *a Common Law*, no; no such thing to be found.

Be it a reality—be it a mere fiction—what is but too undeniable, and too severely felt, a something all this while there is, with which you are ever and anon perplexed and plagued, under the name of *Common Law*.

Yes, says our lawyer; and, *allowing to you that in* Common Law *there is no such thing as* a Law, *yet what you will not deny—and what will equally suit my purpose is—that such things there are—yes, and in no small abundance—such things there are as rules of law.* So much for our lawyer.

Rules? yes, say I; *Rules of law?* no. These rules, whom are they made by? To this question to find any positive answer is possible or not, as it may happen. But what is not only always possible, but always true is, that the person or persons by whom these *rules*, whatever they are, are made, is or are, in every instance, without exception, a person or persons who, in respect of any part he or they may take, or be supposed to take, in the laying down of any such rules, have not any title to make law, or to join in making law.

The sort of person whose case, among those who have not a title to make law, comes nearest to the case of those who have, is *a Judge*. But no law does any Judge, as such, ever so much as pretend to make, or to bear any part in making.

What, if pressed, he would take upon him to say he does is—to *declare* law; to declare what, in the instance in question, is law, to declare that a discourse, composed of such or such a set of words, is *a rule of law*. Thus speaking, he would be speaking the words put into his mouth by Blackstone.

Meantime—be it or be it not a *rule of law*—here at any rate is a rule, which having been made, must have been

made by somebody. What is more, not only has it been made, but by some judge whose duty it is to give to real laws the effect of law—the effect of a law, as if it were a real law, has been given to it. The effect? and what effect? exactly the same as if the words which it is composed of were so many words, constituting the whole or a part of some really existing law.

In the words in question, the rule in question, was it then ever declared before? If *not*, then in truth and effect, though not in words, the Judge by whom this rule is declared to be a rule of law, does, in so declaring it, and acting upon it, take upon himself to make a law; to make *a* law; and this is the pretended law he takes upon him to make.

If it *was* declared before, then not having been made by a legislator it must have had for its maker some person, be he who he may, of whom thus much is known, viz: that in the matter in question no right had he to make law; for its maker, either some Judge—that is, a man who does not pretend to have any right to make law, or some other man who was still further from having any such right than a Judge is. At any rate, not having been made by any one of your respective legislatures, this thing then, which, by your Judges and your other lawyers, is passed off upon you as and for *a rule of law*, viz: of English Common Law—if not by a Judge by whom, then, was it made? for *laws* do not make themselves any more than *snares* or *scourges*.

Of all persons, who, on the making of it, can be supposed to have had a part, the only individual in relation to whom you can have any complete assurance of his having had a part in the making of it is a *printer*: the *printer* by whom the first printed book in which it was to be found was printed.

But, though it is not without example for the man by whom a book is printed to have been himself the author of it, examples of this sort are comparatively rare. In the case, then, here you have *two* persons who have each of

them borne a part in the making of this discourse which is palmed upon you for law: two persons, who to you, let it never be forgotten, are both foreigners.

This book, then, on what ground is it that the author and the printer together can have thus taken upon them to pass it off—to pass it off in the first place upon *us*, in the next place (such as your goodness) upon *you* as and for a book of law.

First or last, the ground—at any rate the most plausible ground that can be made, comes to this: A portion of discourse, said to have been uttered by some Judge—by some Judge on the occasion of some decision pronounced by him in the course of a suit at law. Of this description, take it at the best, was, or in the book was said to have been this pretended *rule of law*—a pretended rule of law made, or pretended to have been made, by a functionary, who, as such, neither had, nor (as you have seen) could so much as have pretended to have, any right or title to make law, or so much as to bear any part in the making of any one law.

Yet, in relation to law, be he who he may, this Judge not only claimed a right to do, but has an indisputable right to do something. What is this something? Take, in the first place, to render the matter intelligible, the cause of the only real sort of law, *Statute Law*, and suppose *that* the sort of law under which the Judge is acting. What in this case is it that, in relation to this same law, he has to do? By some person—say a *plaintiff*—the Judge has been called upon to do something at his instance: something at the charge of some other person who, if he opposes what is thus called for, becomes thereby a *defendant*. *Why is it that I am to do this, which you are thus calling upon me to do? says the Judge. Because* (says the plaintiff) *a law there is which, in the event of your being called upon by a person circumstanced as I am, has ordained that, at the charge of a person circumstanced as the defendant is, a person circumstanced as you are, shall so do. This law says so and so:* look at it here if you have need: *it is a discourse* which is in print; and to which, at

such or such a time, by the constituted authorities, whose undisputed right it was to do so, was given the name and force of law.

Hearing this, or to this effect, the Judge (the facts on which the plaintiff grounds himself being regarded as proved)—the Judge, does he do that which by the plaintiff he is thus called upon to do? What he thereupon and thereby declares—declares expressly, or by necessary implication, is—that the portion of law, in virtue of which the plaintiff called upon him so to do, is a portion of law made and endued with the force of law, by an authority competent so to do; and that of this discourse the true sense is the very sense which the plaintiff, on the occasion of the application so made by him, has been ascribing to it.

Thus doing, what is it that, in current language, the Judge is said to have been doing? *Answer: pronouncing a decision*: a judicial decision: in particular a judgment, or a decree. Sometimes it is called by the one name, sometimes by the other: whereupon in virtue, and in pursuance of this decision, if need be, out goes moreover in his name an *order—a writ—a rule*:—sometimes it is called by one of these names, sometimes by another:—but if it be a *rule*, nothing more than a *particular* rule, bearing upon the individual persons and things in question: at any rate, ordering the defendant to do so and so, or ordering or empowering somebody else to do so and so, at his charge.

That you may see the more clearly what is done under sham law, herein above then you have an account of what takes place under real law. Well, now, suppose *Statute Law* out of the case, what is done is done, then, in the name of *the Common Law*. In this case, then, observe what there is of reality, and what there is of fiction. What, in this case, supposing the matter contested really has place, *a decision:* a decision pronounced by a Judge: say by the same Judge: a decision by which expression is given to an act of his *judgment*, followed by an *order*, or what is equivalent, by which expression is given to an act of his will. The *order* is but *particular:* the *decision* is in the same case.

But to justify him in the pronouncing of this decision, something which men are prepared to receive as law is necessary. *Real law*, by the supposition there is none; fictitious law must, therefore, be feigned for the purpose. What does he then? As above, under the name of *a rule of law*, either he makes for the purpose a piece of law of his own, or, as above, he refers to and adopts, and employs for his justification, a piece of law already made, or said to have been already made, by some other Judge or Judges.

What must all this while be acknowledged is—that, setting aside the question of its propriety and utility in other respects—if, so far as regards *certainty*, viz.: on the part of the decision, *certainty*, and, on the part of those persons whose lot depends on it, the faculty of being *assured* beforehand what it will eventually be—a decision grounded on this sham law were upon a par with a decision grounded on Statute Law, thus far, at least, it would come to the same thing, and it would be a matter of indifference whether the rule acted upon were put into the state of *Statute Law*, or kept in the state of *Common Law*. In that case, for determining the utility of the proposed operation called *Codification*, the only question might be—as between the two sorts of law—which of the two, their respective *sources* considered, afforded, generally speaking, the fairest promise of being most conducive to the universal interest? That which, at the present time, in contemplation of the exigencies of the present time, would have for its authors citizens of the State, mostly natives of the country—chosen by the rest of the citizens, in like manner mostly natives—or that which, in the course of several hundred years, was made at different times by from one to five persons, every one of them appointed by a Monarch—by a Monarch, under a constitution of which even in its most improved state, the yoke was found by you to be so grievous that, at the imminent peril of your lives and fortunes, and by the actual sacrifice of them to no small extent, you resolved to shake it off, and shook it off accordingly."

COMMISSIONERS.

A SEMI-OFFICIAL opinion has recently been obtained from the Lord Chancellor upon a matter of professional practice, or etiquette not provided for in the Rules of Court. In answer to an inquiry whether solicitors might take declarations made by their clients in conveyancing matters in which they were acting, the Incorporated Law Society were informed by the Lord Chancellor 'that, although Order XXXVIII., rule 16, of the Rules of the Supreme Court does not appear to refer to business done otherwise than in a cause or matter, the principle applies to all cases, and a solicitor should not act as a commissioner in any case in which he is directly or indirectly interested, or in which he is acting.' This seems obviously a correct view of the proprieties of the case.—*Law Journal* (*Eng.*)

JUDICIAL CAPACITY.

It is a common thing for the remark to be made about a deceased judge, "He was not a great lawyer." The critic then proceeds to allude to the strong common sense or other qualification which to some minds compensates for the absence of legal knowledge in a judge. The fact is undoubted that with the abolition of what is called technicality, but what may be more properly termed a strict adherence to rules of law and procedure, learning has declined. It is a delightful thing for a flabby intellect to be able to "brush aside" technicalities, and decide cases by the pure light of reason and common sense. A vast amount of thought is spared, research, or its equivalent knowledge, is dispensed with; but the result is too apt to be uncertainty and diversity in decision. This is supposed to be one of the reasons why the Law Reports are giving up reporting decisions except in the Court of Appeal and the House of Lords.—*Law Times.*

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THE SALE OF MORTGAGED PREMISES.

THE distinction between realty and personalty, wholly artificial in its foundation, appears most marked when considered in relation to their respective incidents of pledge and sale. It certainly seems curious that the sale of hundreds of thousands of dollars' worth of wheat, railway stocks, and merchandize can be effectually made by delivery or by a mere memorandum, while the transfer of a trifling amount of land is always surrounded with considerable difficulties and technicalities. Similarly, property in stocks and bonds, or other things of a chattel nature, when hypothecated for advances, can, on default in repayment, be readily transferred to the purchaser, while the sale of mortgaged lands, under the like circumstances, can only be effected through prolonged and technical proceedings. To ask for the abolition of the legal distinction between realty and personalty, would be premature. But it would be in the interests of all parties if the remedies of the mortgagee of lands were rendered more expeditious.

The ordinary decree for foreclosure or sale allows six months for payment of the debt and redemption of the estate. This practically gives the mortgagor upwards of a year to redeem. This privilege, which arose out of the overflowing benevolence of courts of equity towards the

oppressed mortgagor, is one of which the parties entitled to redeem practically never avail themselves. Its sole effect is to obstruct the mortgagee, and thereby impair his security. The mode of proceeding under the power of sale or pursuant to Lord Cranworth's Act (23 and 24 Vict., c. 145) is far more expeditious, though not devoid of objections. The statute does not necessarily exonerate the purchaser's title from being impeached (Fisher on Mortgages, p, 501.) A title derived from a mortgagee exercising the power is seldom considered absolutely safe, notwithstanding the Act or any special conditions contained in the mortgage. Every conveyancer prefers to see the title brought down through a decree of the Court. Any reform, therefore, ought apparently to aim at consolidating the indefeasibility acquired through a decree with the more expeditious procedure under the power. The protection of the purchaser should be absolute, and such cases of hardship as *Latch* v *Furlong*, 12 Gr., 303, would be avoided. The time for redemption on suits for foreclosure or sale might be advantageously shortened from six months to one—ample time, when added to that allowed prior to decree, to enable the mortgagor to redeem if he wish. But the cumbrous practice in dealing with subsequent incumbrancers and execution creditors would still remain as a source of delay. The exercise of the power of sale, with a collateral action of ejectment when necessary, affords the prime requisites of a prompt and inexpensive procedure. The sole disadvantage is the unsatisfactory title acquired by the purchaser. To remedy this, legislative action would be necessary. I would suggest that power be given to the mortgagee vendor or to the purchaser, on application before the Referee of Titles, proper notice being given to all parties interested, to have the sale confirmed. The Referee, on being satisfied that the terms of the statute or the power in the mortgage had been sufficiently complied with, could order the confirmation of the sale and render the title indefeasible. This power might be properly given by way of amendment to the Quieting Titles Act.

The present state of the law impairs the security of the mortgagee, and the elements of risk and unwieldiness in the security must be compensated by a higher rate of interest. The slight amendment indicated above would thus be advantageous to both parties to the mortgage as well as to the purchaser.

J. D. C.

CODIFICATION.

The venue for the trial of this great issue is at present the State of New York. The combatants are mainly David Dudley Field with a few assistants on the one side and the majority of the bar with James G. Carter as their principal exponent on the other.

Mr. Field has devoted a large portion of his life to the work of codification and his labors have been of much service in the advancement of the administration of law not only in New York, where he resides, but in many other States of the Union and we believe also in England and Ontario. The Judicature Act of 1873 abolished for ever, in England, the absurd opposition and conflict between the courts of law and equity, but twenty-five years before that date, namely on the first of July, 1848, the New York Code of Civil Procedure, the handiwork of Mr. Field, had become law, a code whose principal characteristic was the assimilation of law and equity, not only in regard to practice, but also with respect to the principles, upon which the law was administered. Simultaneously with the preparation of the Code of Civil Procedure Mr. Field produced a Civil Code and a Political Code. The

former of these has become law in the States of Dakota and California and the question now being debated is whether it s also t o be adopted by New York.

Fresh from a perusal of the numerous and lengthy pamphlets that have recently issued from the New York press our opinion is that the combatants are not nearly so wide apart in their views upon the main question as they seem to think they are. Mr. Carter delivers himself in 116 pages which Mr. Field says " is divisible into five parts, corresponding to the five acts of a play; beginning with a vilification of codification in theory, followed by a vilification of all codes in practice; then a vilification of the civil code now proposed in particular; next a vilification of the courts and the legislature; and lastily a vilification of me". This is provoked by Mr. Carter's assertion that Mr. Field is actuated by improper motives, that his " cherished passion for the enactment of civil code bearing his image and superscription has, it may be feared, survived his concern for the merits of the performance or its effect upon the public welfare." When writers leave their subject and discuss the personal peculiarities or eccentricities of their opponents, all hope of agreement vanishes. Let an outsider indicate wherein they disagree.

Mr. Carter (33) says: " The *law*, therefore, in respect to *future and unknown* cases is, and must be, *unknown*; and if it be not, and cannot be, known, it cannot be codified. Codication, however, consists in enacting rules, and such rules must, as we have seen, from their very nature, cover future and unknown cases; and so far as it covers future and unknown cases it is no law that deserves the name." Mr. Carter feels that this is, apparently, an argument against all statute law and proceeds to distinguish the cases. He says :—" In statute law, when limited to its proper subjects, and kept within its appropriate boundaries, there is no attempt to make rules for *unknown* conditions of fact. These conditions are, indeed, to arise in the future, but they are, nevertheless *known*, or which is the same thing, *contem-*

plated as known, for they are, as it were, created by the statute, and particularly specified in it. If a case arise presenting those conditions, it is disposed of by a statute which was passed in full contemplation of such a state of things. If any case arise which does not present the specified conditions, it does not fall within the operation of the statute, and is not decided by the statute." This distinction, if it exists at all, is without its proper complement—a difference. If there is a statute which says that the assignee of a mortgage may plead that he is a purchaser for value without notice, will the provision be useful if in a statute, but bad if in a code? Is there any objection to a clause, either in a statute or a code, declaring that a married woman has power to convey her real estate without her husband's concurrence? But why distinguish between a code and a statute at all? A code *is* a statute, or it has no force. Mr. Carter truly says—if a case happens not contemplated by the statute, the statute will not apply to it, and a code being a statute the rule applies to a code. There is, therefore, no force whatever in this objection.

There is a sense, however, in which Mr. Carter is right. His pamphlet is based upon the idea that all law is to be found in the new code; that certain rules are to be promulgated, and that there is thenceforward to be no more judge-made law; that answers are to be provided for all unthought-of conumdrums. Mr. Carter is right in his opposition only because his idea of a code is entirely erroneous. He is right in closing the door against a ravening wolf but he may have slammed it in the face of an angel. He has never stopped to inspect the object.

Mr. Fowler states the issue in this way: "The party opposed to codification simply adhere to the old position that truth is too many sided to be shackled; the party of codification to the old position, that certain fundamental propositions of law may be so formulated as to afford great aid to the arrangement and discussion of the propositions not formulated" (39). The question then seems to be, can

a very large number of legal propositions be so formulated as to afford great aid to the arrangement and discussion of the propositions not formulated? In other words, are there a sufficient number of points, definitely settled or ripe for settlement, to make it worth while to gather them together out of the mass of unsettled law, and to print them by themselves? If there are but a few points let them alone and let them accumulate; but if there are many, let us by all means have them scheduled. The answer urged to this seemingly sensible proposition is that such a schedule would be of no use, that it would merely exhibit a lot of A, B, C, two-and-two-make-four propositions that no one would ever look at. This argument only goes to the expense of preparing the schedule—the work when finished would be unobjectionable, but not worth the money it would cost. Now Mr. Carter may be thoroughly familiar with all settled points in all departments of law, maritime, mercantile and criminal, the law of real property, promises and torts, but we humbly confess our ignorance of some hundreds, if not thousands of them. We will go further and admit that our most cherished convictions upon settled points, have frequently been entirely disregarded by the latest case upon the point. For example we were brought up to believe that payment was not a sufficient part performance, of a contract respecting real estate, to take it out of the Statute of Frauds, and yet we find learned judges in England telling us that this may require reconsideration.

If we were the only practitioners who have not all the settled principles at their finger ends it would make very little difference to the community, but we find that, when in argument we assume the unimpeachability of certain propositions, the foundations are once more attacked and we are obliged to prove again their solidity. The text books say that under the statute of 27 Eliz. a voluntary deed is void against a subsequent purchaser, for value, even with notice of the prior deed, but this was recently strenuously, and with much ingenuity, combatted by one of our leading counsel. In truth without a code every principle of law is open to

attack and although the attacks fail the labor of defence must be undergone. Now the advocates of codification desire that an examination should be made of our books and that, as far as possible, the threshed should be separated from the unthreshed grain, that the former should be placed by itself and the latter left for the threshers to thresh over again. We do not think that any lawyer should object to this. It would save him no end of labor.

We would not advocate, however, the immediate adoption of a complete code. One branch of the law might be taken up and then another. In this way each would secure greater attention and all would be better done. The criminal law will no doubt be very largely codified at the next session of Parliament. The law of bills and notes has been practically codified in England and the statute should be made the basis of a code for Canada. The law of evidence is peculiarly well adapted for the work of the codifier, as shewn by Stephen's Digest of Evidence. The law of partnership and other subjects have been reduced to system by various recent writers and would follow in due course.

It is often objected that, if the development of the law passes from the judges to the legislators, it will constantly be the subject of crude and ill-digested amendment. To obviate this we would suggest that it should be duty of the judges in appeal to make suggestions from time to time, as cases come before them, upon the advisability of, or necessity for, amendments. In this way the code would be from time to time improved and would run no risk of being impaired.

HOW TO ARGUE A BAD CASE.

BY GEO. M. DAVIS, ESQ., OF LOUISVILLE.

IN arguing a bad case before the judge, the first thing for the sagacious practitioner to do, is to get as far away from the merits of the case as possible. With this idea you must make your real case of secondary importance, or further off even than that, if possible. Plant yourself at once, therefore, upon some broad principle, and endeavor to allure the other side into grappling with you upon it. Rise above the mere case of your Mr. Jones, and make the country at large stand as your imperiled client. In other words, the first thing to do, if possible, is, with a look of profundity, and voice of rotundity, to raise a "constitutional point."

Now there is nothing so pleasing to the ordinary *nisi prius* judge as to have raised, in his court, deep problems of constitutional law. When you rise, with a copy of Coolley, Story and other constitutional authorities before you, and, for purposes of greater impression, the fifty pound volume of the United States Revised Statutes, containing the Federal Constitution (for the bigger the book the better, in constitutional arguments), you will perceive the judge at once undergo a marked change. If he has, from Democratic tendencies, or from the heat of summer, taken off his coat or drawn his boots, you will see him carefully put them on, and, bracing himself back as an "upright judge," sit with a thoughtful air, conscious that there now hangs upon him the destiny of the country and of the future unborn. You may perhaps perceive during the argument none of the usual signs of weariness, but rather that expression of fortitude and death which one might imagine Chief Justice Marshall's countenance to have exhibited during the argument of the Dartmouth College case by Daniel Webster.

There is nothing better in a bad case than to announce with emotional intensity that the effort of the opposing counsel would, if permitted to be successful, result in a decomposition of "vested rights;" or that they would ruthlessly impair the "solemn obligation of contracts;" or that they are permeated with "*ex post facto*" malignity.

Magistrates' courts, I have observed, are peculiarly susceptible to the seductive influence of constitutional law.

Nor, in these fundamental ramifications, should you confine yourself alone to the constitution of your particular State. You should "broaden yourself out" and take in the constitution of the Union; including the recent amendments, which, under a "broad-minded" construction, you may contend, with a fair hope of being allowed to proceed, to mean almost anything that your necessities require. Nay, your genius, if capable of still greater daring, may soar back to "*Magna Charta*" itself, and disport awhile amid reminiscences of "Runnymede," "King John," and the "Powerful Barons," who so often serve for padding in the powerful efforts of our locally great.

When, however, you feel that you can no longer sustain flight in the rarefied atmosphere of the lofty altitudes of constitutional law, be sure, in your downward descent, that you alight upon the "Statutes."

Now, in the great body of statutory law, it will be marvelous indeed if you cannot find something that will give you hope and comfort. Remember, in the first place, that all the statutes of England prior to the "fourth year of James I." are good as new here in Kentucky. Remember, too, that all the statutes of Virginia "prior to 1792" are also legal tender. Remember further, that all the statutes that fill the tremendous volumes of the "United States at Large," are of potency and that the great body of our own laws, as amended and improved by the constantly augmenting wisdom of succeeding legislative intelligences, has created a mass of profound statutory law, some of which will strength-

en almost any bad case that may be imagined. There are many sections of our code that can, by a little ingenious construction, be converted into bulwarks behind which a bad case may rest in apparent safety. I remember, a few days ago, when an injunction was sued out to prevent a Kentucky corporation (the Knights of Honor) from emigrating from the state of Kentucky to Missouri, an ingenious friend suggested to me, as counsel for the proposed emigrant, a statutory argument, my failure to use which possibly led to the perpetuation of the injunction. He called attention to sec. 688 of the code, which "abolishes the writ of *ne exeat*," and be said: "How can this corporation be prevented from going out of the State, when the writ of '*ne exeat*' has been abolished by solemn statute?"

If, however, you cannot, by ingenious and subtle transfiguration of the statutes, manage to anchor your canoe in the rapids, the next best thing is to fall back upon your reserve learning, and to make disclosure of what my Lord Coke calls "The Amiable and Admirable Secrets of the Common Law."

The current scientific theory of this day is that of "evolution," and one of the leading tenets of evolution is, that mankind, in its progress from barbarism to civilization, passes through many degrees of morals; so that, at one time in its career a thing will be considered right, which at later time, will be declared wrong; very much as the clothes of a child are ridiculed as unfit when he comes to be a man.

Whatever case you may have, therefore, and however bad it may seem now, it is pretty certain that it would have fitted the ideas of right in some one stage of the progress of the evolution of England from its barbaric state to its present condition. The fact is, that a bad case is somewhat like Lord Palmerston's famous definition of "dirt." He said that dirt was simply "matter out of place." So a bad case is simply a case out of time. In old times, we know that murder was rather approved as a fine art in England; and we know that batteries and trespasses were by no means as

reprehensible as now. Embezzlements are still cherished by the common law as no crimes. You have, therefore, only to search back through the various strata of the English common law to that one to which your case properly belongs; and you will generally have little difficulty in finding precedents somewhere in the line that fit and justify it entirely. For example, the case, bad at this time, was probably a good case in the time of Coke; and, therefore, Coke is your authority. If your case be very bad you may have to go as far back as Bracton, or even to the Year Books. But the further back you go the more learned it sounds.

And it is to be said in favor of this common law mode of presenting a bad case, that nothing is more pleasing to the judge than to hear arguments, and to rest his opinions upon old common law points. An opinion of a modern judge, so full of the old common law authorities that you can almost blow the dust off it, is looked upon by its author with peculiar pride; for he knows that it is sure to be complimented as "able and exhaustive" by succeeding lawyers who may have occasion to cite it as an authority in their favor.

Let us assume, however, that you have searched, the heights of the constitution and the depths of the statutes and the varying strata of the common law, and found no comfort there. Under such circumstances, it may pay you, like many yersons who have committed dubious acts in England, to take a little trip abroad. In other words, you should stray over into the domain of the "civil law." You may, thereupon, descant learnedly upon the "Code of Justinian" or the "Code Napoleon," and exhibit traces of a mind too broad for this hemisphere. You will find that a little dab of civil law, especially in Latin, will sometimes cause the judge to come down without further debate.

A large amount of this peculiar Latin may be found ready in Judge Story's book on Bailments.

If, however, all of these successive resources that I have named, prove fruitless, you will be driven to another resort,

viz.: the Kentucky Reports. And here let me warn you not to be downcast or disheartened at this stage; nor should you yield to the gloomy apprehension, that because you have found the law against you everywhere else you will find it against you there. By beating the "Bushes" you may expect to scare up much unexpected law.

Of course, if a case is found in your favor there, it generally ends your troubles; for it will be followed by all the courts in the State, except sometimes by the one that rendered it.

There is also a very valuable magazine of unknown learning in those manuscript opinions marked "not to be reported." I have known some desperate cases to be won by the citation, from memory, by our older lawyers, of manuscript opinions, which, however, they always assure us younger members, were "burned up in the appellate clerk's office fire in 1865."

An ingenious member of the bar, it is said, has with great advantage invented the idea of saying to the judge below, that he has, besides reading the opinion, had a more or less confidential talk with the judge who wrote it, in which the judge told him that the opinion was meant to go much further than on its face it seems to go; and our friend sometimes accompanies this with an intimation, that if the judge below, does not regard the additional light thrown upon the opinion by the confidential communication, the chances are he will have occasion to meet the most dreadful of all things to a *nisi prius* judge, a reversal of his opinion on an intimated appeal.

If you find, after a careful exploration of Barbour's Digest, that the Kentucky law also is silent when you invoke it, the next thing left you is to attack that myriad-minded monster, the "United States Digest." Sit yourself down therefore to this work of digestion, in that hopeful spirit in which the sick and hungry Sancho Panza contemplated an "Olla podrida."

"Quoth Sancho, that great dish which I see smoking yonder I take to be an olla-podrida; and amidst the diversity of things therein contained, I may surely light upon something both wholesome and toothsome."

It is the boast of our American people that, owing to our very great diversity of soil and climate, we are able to show well-nigh every product of nature, from the tropical fruits of Florida, Texas and the Pacific Coast, to the hardy pines of frigid Maine. But while America may be proud of her diversity of products in other directions, her greatest praise for variety of production is certainly in the line of law. If a vote were put upon any conceivable point, to the reports of the thirty-eight States, rarely indeed would it be "unanimously carried." It has been poetically said that when Nero died "one" hand strewed flowers upon his tomb; and no matter how bad your case may be, you may rest assured that you can lay upon its tomb the tribute of some precedent in its favor, from the United States Digest.

Let us suppose, however, that you have gone through all these processes of enlightenment, and have bombarded the court with the various legal artilleries I have named. Let us suppose your case so bad that you can develop nothing in the constitution or the statutes, or the decisions to support you. Still do not succumb. Your case is a hard one. But all is not yet lost. There is one last resort for the despairing attorney. There is one faint light which his dying eyes may see. It may not amount to much. It may prove illusive. But it is the duty of the lawyer to try all legal means. As a last resort therefore, my friends, and only in that dreadful extremity, fall back upon what is known as the "argument of the principle" and the "merits of the case."

In that emergency, you may proceed to give, possibly from your own personal knowledge, a vivid biographical sketch of the moral perfections of your client; and perhaps likewise a converse picture of the mental and moral obliquities of his opponent. Pay that compliment to the credibility of your witnesses which they have always deserved, but

have perhaps never before received. Denounce the "technicalities" of the opposing law. Appeal to that higher plane of the profession, in which the judge, overlooking mere technical precedents, rises into abstract ethics, and considers the case upon "high points and general principles." Indulge the sensibilities of the race. Bring the calm light of the emotions into play, to assist the logic of the court. Paint the beneficent effects of the decision in your favor. Depict the fearful consequences of a decision against you. And wind up with an inspiring burst of professional fervor, or by a pathetic appeal, in a minor key.

If, however, in spite of all these laudable legal efforts, the judge below is obdurate, and the decision is against your unhappy client, still, my brother, do not yield wholly to despair. As in the death of a good man comes his brightest hope, so in the loss of a bad case comes its best opportunity. Remember there is organized, in the jurisprudence of every State, a series of superior tribunals, "created for the express purpose," as Judge Emmons once said, "of reversing the lower courts." Remember, as you lie rolling over in the dust of the lower arena, that there still stands a higher tribunal, whose doors are open to the defeated and the beaten, and to cases adjudged "bad," and to which the successful can never appeal.

At the threshold of the Appellate Courts the history of a "bad case" naturally ends; for, there under the requirement of even-handed justice, all cases must stand alike.

WINNIPEG LEGAL CLUB.

WE are glad to notice that this club has again commenced operations. We regard the exercises engaged in by the club as the very best training for success at the bar. They are well calculated not only to dispel the timidity which, if allowed to take deep root, will mar the usefulness of the finest intellect, and form a considerable subtraction from success, but also to cultivate and develop the ready wit, and to supply a fund for quick retort, without which many a case will inevitably be lost. We have no fear that the members of such clubs will, as is so frequently asserted, become captious and hypercritical in their arguments or bumptious and offensive in their manner. We believe that the refining influence of such clubs extends both to the intellect and the manner; that the tone and standard insensibly adopted is almost always that of the most cultivated member and sometimes reaches even a higher plane. All that young men, as a rule, require for their education in polite demeanour is the presence of a proper ideal during action—extended, of course, over a period sufficiently long to closely associate the one with the other, in other words to form a habit. We believe that the meetings of the Winnipeg Legal Club will do much to tone up the minds and, if necessary, tone down the manners, of the aspirants for legal honors, and we strongly recommend all those who are bent upon making a determined effort to succeed at the bar to avail themselves of the advantages of the club. The officers for the present season are: —President, W. E. Perdue; Vice-President, A. E. McPhillips; Secretary-Treasurer, R. W. Bradshaw; Executive Committee, Messrs. Wade, Davis, Haney, Whiteman, Wemyss and Wilson.

FLOGGING AT THE GAOL.

WAIVING the constitutional question, no one doubts that in order to justify the corporal castigation of a recaptured prisoner, there must be some written law somewhere. Granting that the Legislative Assembly has power to impose the lash as a part of prison discipline, and that it has power to delegate to the sheriff, or the Lieutenant-Governor-in-Council the right to frame rules under which it is to be applied, there does not appear to be either statute, order-in-council, or rule which assumes to permit whipping of prisoners. Under Con. Stat. Man. c. 7, ss. 53-57, rules may be made for the maintenance of order, the duties of the gaoler and turnkeys, and with regard to all matters necessary for the proper security and the due ordering of the gaol. Under this statute rules have been made and approved of by the Lieutenant-Governor-in-Council. Those of them which relate to the penalty for attempted escapes or to the infliction of punishment for any offence, are as follows :—

18. The punishments allowed in the gaol for breaches of discipline shall be :—

(No. 1.) The hard bed, with sufficient covering for the season of the year, for an indefinite period.

(No. 2.) Bread and water diet for a period of not more than five consecutive days.

(No. 3.) Dark cell, and ball and chain.

(No. 4.) Chained to the floor.

21. Prisoners attempting to escape and thereby endangering their lives will be subject, *under the statutes*, to a further term of imprisonment.

It will be seen that flogging has not been sanctioned as a punishment for any offence, and that the penalty for an attempted escape is a further term of imprisonment. This further term of imprisonment must be awarded after trial, and the law has provided the tribunal. An attempted escape is a misdemeanor; and one accused must be tried and condemned, for this, as for all other crimes. No power is given to the gaoler, or even the attorney-general, to convict without information, evidence, or the presence of the prisoner.

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QUEEN'S COUNSEL.

THE Hon. S. C. Biggs, H. M. Howell, J. A. M. Aikins and John S. Ewart have been gazetted Queen's Counsel.

The practice of singling out, from time to time, certain barristers for invidious distinction, should have been abolished together with patents of monopoly—that is some centuries ago. When courtiers were paid for sycophancy by grants of lands, titles or special privileges, it was fitting that the king's favorites at the bar should have precedence over those who withstood his pretensions. And in the England of to-day, with its survival of patents of nobility and of enormous annuities paid to the wealthy inheritors of names, out of the contributions of the poor, the practice is still, if indefensible, at all events kept in countenance. But in Canada it is an anachronism, and (barring the presence of a few knights) is the only part, and the most obnoxious part, of a system wholly foreign to our institutions, manners and feelings.

There are two grounds upon which these patents of precedence are supposed to be granted—political services and professional merit. Of the two, we think the former the less objectionable. Let it be understood that during tory reign the tory lawyers can, on application, obtain their

silk, and when the grits succeed to office that their friends shall succeed at the bar, and, all events, we have an intelligible system. But, if merit is to be the ground, who is to award the prize? It is safe to say that the Governor General and his Council are seldom, if ever, personally aware of the respective abilities of those who are in daily competition at the bar, and yet they are those who decide the question. Ifthe matter were as easy of decision as a horse-race, by all means let there be an annual contest, and let the best man get his reward. But, in so doubtful a matter as legal ability, who can decide? What is the criterion? Is it success? That comes sometimes without learning. Is it learning? That may exist without success. Is it both learning and success? Then what degree of each? Twenty briefs at an assizes, with fifteen wins to five losses? There is no gauge, and from the leaders to the duffers the gradation is so insensible that there must always be great difference of opinion as to the proper order of merit. It will not do to let the judges make the selection—although they are the most competent to do it—for they must keep themselves free from the suspicion of favoritism. It would disturb the harmonious relations of the bar to place the matter in the hands of practitioners, or the Law Society. Practically, those with influence at Ottawa, dispense the patronage, and usually the list is absurd and indefensible.

We object to the system because it gives one barrister a factitious importance and dignity over his fellows. If nature has endowed him with greater ability or industry, that is no reason why the Government should add to his advantages, and, if his inclinations are political rather than professional, he should look for political and not professional rewards.

We object to the system also, because it is carried out at the expense of jealousy, ill-feeling, and heart-burning, and because it subserves no useful purpose. What propriety is there in exalting one man and, in consequence, relatively depressing another? Till nature changes, favored elevation will turn conceit into superciliousness, and slights will discourage and dishearten all but the most indomitable.

Without being, ourselves, invidious, we may perhaps venture to say that, if such men as F. Beverly Robertson, N. F. Hagel, or W. H. Culver do not recognize their inferiority to those above named, and therefore concur in the omission of their names from the present list, they have more than mere self-appreciation wherewith to back their opinion.

But we cannot discuss such a subject. It is one that trenches too closely upon personal feelings and aspirations, and cuts too keenly wherever it touches. We advocate the abolition of the title. Let it be witheld from those who do not require it in order to success, and not granted to those who cannot succeed upon their own merits.

ENTERING RECORDS.

RECORDS must be entered between nine and twelve o'clock of the commission day, and the theory is that all the witnesses and counsel in all the cases are to be on hand at the opening of the court, for no one can tell whether his case is to be tried on that day or three weeks afterwards, and no arrangements can be made until the lists are filled up. If the rest of the world stood still while the assizes progressed there could be no objection to putting the theory in operation. But people insist upon giving as much time as they can to their business, and as little as possible to the assizes. Why should not cases be entered at any time up to the last day for giving notice of trial, and after that, only upon a judge's order? This is the rule in England and Ontario, and in equity cases in this Province, and it works well.

REGISTRY ACT.

THE following is not only a nice point, but a very important one :

The owner of land sells and conveys first to A, and afterwards to B. At the time of B's purchase he had actual notice of the conveyance to A. B sells to X, who had no notice of A's interest, his deed not having at the time of the conveyance been registered. The order of registration is, first, the deed to B; seeond, the deed to A; and third, the deed to X. Quære, Is X entitled to the land as against A?

For X it may, by hypothesis, be said that at the time when he took his conveyance and paid his purchase money, the registry showed a perfect title in B, his vendor, and that he had no notice of anything not disclosed by the registry. Is he not, then, perfectly safe, and if he refrains from recording his deed, is not his only danger that his vendor may execute another conveyance to some other person who by registering will obtain priority? The general assumption has been in the affirmative, but it would be well to give careful attention to the provisions of the Registry Act before acting upon this opinion.

Irrespective of the Act, X would have no chance of success. Then which clause of that Act helps him?

Section 43 is as follows: "Priority of registration shall in all cases prevail, unless, before such prior registration there shall have been actual notice of the prior instrument to the party claiming under such prior registration." According to Mr. Justice Gwynne, in *Millar* v. *Smith*, 23 U. C. C. P. 57, these words may be transposed as follows: "Priority of registration shall not prevail, if, before such prior registration, the party claiming under the prior registration shall have had actual notice of the prior instrument."

It seems to be pretty clear that the words "the party claiming under such prior registration" refer to the party to the instrument itself, and not to subsequent purchasers claiming through such party; in fact, that the section does not contemplate the position of X, and makes no provision for him. If it were otherwise, it would be immaterial whether subsequent purchasers had notice of the prior instrument or not, so long as they did not know of it before the registration of the subsequent instrument. It would then be perfectly competent for any one to purchase from a person who had already conveyed away his estate, to the knowledge of the purchaser, to register his conveyance, and then, after relating the whole fraud to his sub-purchaser, to conclude a sale to him—that is, provided, of course, the sub-purchaser was not aware of the first sale prior to the registration of the second deed.

Section 40 is the only other section which can have application. It provides that any instrument shall be void as against a subsequent purchaser for value, without notice, "unless such instrument is registered in the manner in this Act directed before the registering of the instrument under which such subsequent purchaser or mortgagee may claim."

Now X is a subsequent purchaser for value, without notice. X therefore is within the section unless the prior deed to A was registered "before the registering of the instrument under which he (X) claims. What deed is referred to? X claims under two deeds—the deed to B and the deed B to X. Is not the competition for priority between the deeds to A and B? And if the deed to B is registered first, and X claims under it, is he not, being a purchaser for value without notice, entitled to assert the priority of the deed. B could not assert it, for he was not a purchaser within the meaning of the clause; but X gave value and had no notice. Cannot he claim the benefit of the prior registration? It will be observed that the statute does not provide that the prior deed is to be void as against the subsequent *deed*, but as against a subsequent *purchaser*.

Let us suppose, for the sake of argument, that the words "the instrument under which he claims" refers to the deed B to X—that is to say, that the subsequent purchaser must have registered his own deed before the registration of the first deed. If this be the meaning, then there is no reason why the deed to B should be registered at all, and if it were not, X would succeed because he was a purchaser for value without notice, and had registered his deed prior to the registration of the deed to A. Again, if this be the meaning of the section the competition for priority is not between the two deeds originally made, but between the first deed and the deed to the person seeking priority over it. And it follows that if B were a purchaser for value, without notice, and registered first, he could not, after registration of A's deed, sell to anybody, for nobody could then register his deed before A. If any one did purchase, he would be told that the deed under which he claimed was not registered before A's conveyance, and he could have no benefit of B's priority of registration. It seems to us that he should be entitled to avail himself of that priority; that the words, "the instrument under which he claims," must therefore mean the one of the two *competing* deeds—the deeds to A and B—through which his title comes; and that if, therefore, at the time when X paid his money and took his conveyance he had no notice of A's interest, he is entitled to priority, even though the deed to himself never was registered.

The opposite rule would not, however, be an unreasonable one to establish—viz.: that if a purchaser intends to rely on the Registry Act, he should put his deed upon record under its provisions; that he should not pay his purchase money until his conveyance is registered; and that he should search the records down to that time. Until the point is determined, this "opposite rule" is the safest for the profession.

HOWELL ON NATURALIZATtON.

RECEIVING, as we do, every year large numbers of emigrants from foreign lands, it is important that the principles of the existing law of naturalization should be understood.

"By the common law of England, every person born within the dominions of the crown, no matter whether of *English* or foreign parents, and in the latter case, whether the parents were settled, or merely temporarily sojourning in the country, was an *English* subject, save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of *England*." (*Howell*, pp. 7, 8.) In this and other places the learned writer makes the mistake of using *English* for *British*, and *England* for *Great Britain*—a mistake wholly unpardonable to Scotchmen and Irishmen. His meaning is, however, clear enough, and being Canadians we forgive him.

"Once a British subject, always a British subject," was a maxim of the common law. In *Fitch* v. *Weber*, *6 Hare*, *63*, Vice-Chancellor Shadwell said: "Nothing, I apprehend, can be more certain, than that a natural born subject cannot throw off his allegiance by any such acts,"—referring to naturalization in the United States. And Chief Justice Cockburn, in his work on Nationality (pp. 63, 177), asserts, "as an inflexible rule, that no British subject can put off his country, or the natural allegiance which he owes to the sovereign, even with the assent of the sovereign; in short, that natural allegiance cannot be got rid of by anything less than an Act of the Legislature, of which it is believed no instance has occurred."

This is, however, all changed by recent legislation, and the principle of expatriation is acknowledged by treaty between Britain and foreign countries—and, among others, the United States.

"In the light of the new naturalization laws, English and United States authorities give the following definition :— "Expatriation takes place when a person loses his nationality, and renounces his allegiance to his native country, by becoming the subject of a foreign state. Expatriation by a subject has been made possible in the United Kingdom by the Naturalization Acts of 1870 and 1872, and in the United States by the Act of Congress of July 27, 1868, and in Canada by the Act of 1881." (*Howell, p. 14.*)

These and other matters are well shown in Mr. Howell's book. The various statutes bearing upon the law are given, and forms for practical use provided.

BRITISH COLUMBIA LAW REPORTS.

BRITISH Columbia, although many years older than Manitoba, is a little later in commencing a series of law reports. They are well done, however, and the Columbians are lucky in having secured the services of Mr. Irving, formerly of Hamilton, Ontario, as editor. Judges on the Pacific seem to be as unable as some of their brethren in other places to express an idea in less than a page or two. The reporter cannot help this, however, and perhaps the lengthy appearance of the judgments when in type may induce their lordships to practice brevity.

JUDGES' SALARIES.

WE were in error in saying that nominally the salaries of the Ontario and Manitoba judges are the same. They are not the same. The Ontario salaries are $1,000 more than the Manitoba, which, with the circuit allowance averaging another $1,000, leaves the latter fifty per cent less than the former. This is extremely unfair to our judges, although the bar cannot but be pleased with the arrangement if the result is that the political candidates strive for the Ontario Bench and leave the Manitoba for the hard working and able devotees of the profession. What justice is there in giving Mr. Justice O'Connor $6,000 a year and any of our *puisnes* $4,000? The fact that Mr. Justice Smith was sent here and Mr. Justice O'Connor to Toronto may be a matter for sincere congratulation to our bar, for even *The Canadian Law Times* thinks that politics and not the fitness of things dictated Mr. Justice O'Connor's elevation to the bench at all; but there can be no doubt of the unfairness of the arrangement. The best man should get the best position. We trust that our representatives in Parliament will attend to this matter when it arises for discussion at the next session.

A cognate matter for simultaneous settlement is the equalization of the judges with reference to retiring allowances. No doubt it was by oversight that no provision was made for the Manitoba judges in this respect, but whether intended or not, our judges should have their old age provided for, and all the more so because of the inadequacy of their salaries while at work.

CONVEYANCING.

THE verbose technicalities of legal phraseology are well hit off in the following: "If a man would, according to law, give to another an orange, instead of saying "I give you that orange," which one would think would be what is called, in legal phraseology, "an absolute conveyance of all right and title therein," the phrase would run thus: "I give you all and singular my estate and interest, right, title, claim, and advantage of, and in, that orange, with its rind, skin, juice, pulp, and pips, and all right and advantage therein, with full power to bite, cut, suck and otherwise eat the same, or give the same away as fully and effectually as I, said A. B., am now entitled to bite, cut, suck or otherwise eat the same orange, or give the same away, with or without its rind, juice, pulp and pips, anything heretofore or hereafter, or in any other deed or deeds, instrument or instruments, of what nature or kind so ever, to the contrary notwithstanding."—*Ohio Law Journal.*

BEGUILING THE COURT.

WRITS have recently been issued in an action of a remarkable kind brought against the defendants in a previous action, two Queen's Counsel, three junior counsel, three firms of solicitors, and the Attorney-General. On payment of a hundred thousand pounds and one guinea costs it is in the usual form stated that all proceedings will be stayed. The action professes to be brought under 3 Edw. 1 c. 29 (the Statute of Westminster the First), whereby it is provided that 'if any serjeant, pleader, or other do in any manner of deceit or collusion in the King's Court, or consent unto it in deceit of the Court, or to beguile the Court or the party, and thereof be attainted, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that Court for any man, and if the trespass require greater punishment it shall be at the King's pleasure.' This Statute is still unrepealed, so that all concerned should beware how they attempt to 'beguile a Court.'—*Central Law Journal.*